Supreme Court, U.S.
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No. 02 1241 FEB 20 2003

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In The
Supreme Court of the United States

ARMOND RUSS, in his official capacity as the Commissioner of the Kentucky Department for Facilities Management,

Petitioner,

v.

Rabbi JONATHAN ADLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state legislative enactment calling for a public display containing a religious symbol constitutional on its face under the fact-intensive analysis of the Establishment Clause when the proposed display has not yet been designed or installed but the express terms of the enactment provide a valid secular legislative purpose and expressly require a secular display?

PARTIES TO THE PROCEEDINGS

Parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were petitioner Armond Russ in his official capacity as Commissioner of the Kentucky Department for Facilities Management and respondents Rabbi Jonathan Adland, Reverend Johanna Bos, Reverend James Greenlee, Reverend Gilbert Schroerlucke, Jeff Vessels, and the American Civil Liberties Union of Kentucky. The Thomas More Center for Law and Justice, Edward L. White III, appeared as *amici curiae* in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Armond Russ, in his official capacity as Commissioner of the Kentucky Department for Facilities Management, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App.1) is reported at 307 F.3d 471. The order denying the petition for rehearing and rehearing *en banc* is reprinted in the appendix. (App.55). The opinion of the district court (App.43) is reported at 107 F.Supp.2d 782.

JURISDICTION

The judgment of the Sixth Circuit was issued on October 9, 2002, and the petition for rehearing and hearing *en banc* was denied on November 22, 2002. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

Article III, Section 2 of the U.S. Constitution, set out verbatim below, provides in relevant part that "[t]he judicial Power shall extend to all [c]ases" and "[c]ontroversies":

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other Public Ministers and Consuls; – to all cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl.1:

> Senate Joint Resolution 57 is reprinted verbatim in the appendix. (App.57).

STATEMENT OF THE CASE

This case presents a special circumstance in which Federal courts should defer under the Establishment Clause to citizens of states acting by and through their state legislatures. The Establishment Clause requires a valid secular purpose and effect for every governmental display containing a religious symbol. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989). The effect of a particular display is determined by examining its actual appearance and surrounding

context. *Id.* When a state legislature adopts a resolution calling for a publicly displayed religious symbol, and the display has not been installed, the court cannot possibly determine whether the actual display has the effect of endorsing religion. In this circumstance, where a state legislature provides a valid secular purpose in the language of the enactment, and the enactment expressly mandates a secular effect, the legislature's expression of intent is entitled to deference.

In the 2000 legislative session, the Kentucky General Assembly adopted Senate Joint Resolution 57 (SJR 57). (App.57). Section 2 of SJR 57 authorizes the display of the Ten Commandments on "public property" when "incorporated into an historical display along with other historic documents as described in KRS 158.195." S.J. Res. 57, § 2 2000 Leg. (Ky.). (App.63-64). The express purpose of the display "shall not be to advance religion," but rather:

> [T]o advance the important secular purpose of illustrating how the Bible and the Ten Commandments have influenced the faith, morals, and character of American leaders who, in turn, have shaped American Law, public policy, and institutions.

Id. The legislature also requires that SJR 57 be posted with the exhibit:

> To advance the secular purpose of making the citizens of the Commonwealth more knowledgeable concerning the founding of America, the intent of the nation's Founders, and the formative influence of the Bible and the Ten Commandments on American leaders, institutions, and law.

Id.

Section 8 of SJR 57 requires the petitioner to assemble a cultural and historical display that, among other elements, contains an exhibit of the Ten Commandments. SJR 57, § 8. (App.65). Under Section 8, the petitioner is required to relocate a donated monument of the Ten Commandments to a permanent site on Capitol grounds to be made part of a "cultural and historical display." (App.65). SJR 57 will be posted with the proposed exhibit "in order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." (App.65)

The proposed cultural and historical display will be located in a garden area on the Capitol grounds in Frankfort, Kentucky. (App.65) (R.12). This garden area contains at least seven other historical monuments and markers erected by the citizens of the Commonwealth to commemorate important people and events in the history of Kentucky. (R.12). Three of these markers commemorate devoted civil servants, one commemorates a Kentucky humorist and writer, one welcomes visitors to Kentucky, one relates to the Civil War, and one memorializes prisoners of war and soldiers missing in action from the Vietnam War. (R.12). One of these markers is a large floral clock that is thirty-four feet in diameter and weighs 200,000 pounds. (R.12). The garden area and surrounding historical markers comprise the location and context for the historical and cultural display called for by SJR 57. (R.12).

The express language of SJR 57 provides a valid secular legislative purpose and specifically requires a secular display. SJR 57 § 2, 8. (App.65). The resolution, however, does not identify the exact elements or dictate the precise design of the proposed display. (App.65).

The respondents filed a complaint and motion for injunctive relief in the District Court seeking to enjoin the Commonwealth from installing the proposed display. (R.1, 2, 3). Despite the fact that the display had yet to be designed and installed, the parties agreed to proceed with the case as to the facial constitutionality of the resolution. (R.5). The District Court applied the two-part test for historical displays adopted by this Court in *Allegheny,* and declared Section 8 of SJR 57 unconstitutional. (R.16) (App.43). The court permanently enjoined the petitioner from installing the proposed display on Capitol grounds. (R.16) (App.43).

The Court of Appeals, over the dissent of Judge Batchelder, affirmed the District Court's judgment. (App.1). Under the first part of the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see Allegheny*, 492 U.S. at 597, the court concluded that there was no secular purpose for the display despite the legislature's express valid secular purpose set out in the language of SJR 57. (App.15). The court decided it was required to strike the Commonwealth's express secular purpose based on *Stone v. Graham*, 446 U.S. 59 (1980), the precursor case to SJR 57 in which this Court struck a similar secular legislative purpose. (App.19). The court also rejected the express secular purpose in the resolution for lack of facts describing the appearance of the proposed display. (App.18). According to the court, the language in the resolution finding the Ten Commandments to be the foundation of law and clauses in the preamble reflecting the religious thoughts and writings of the nation's founders defeated the Commonwealth's secular purpose. (App.16, 17). The court made special note of its conclusion that the Ten

Commandments exhibit would be the largest element of the proposed overall display. (App.18, 19).

The court also rejected the petitioner's argument that the proposed Ten Commandments exhibit and overall display would be cultural and historical as specifically required by SJR 57. It concluded instead that the Ten Commandments exhibit "can be seen by motorists driving on the road" and will be "the largest monument in the area, except for the floral clock." (App.25, 32). Based on the description of the garden area that will host the proposed cultural and historical display, the court stated that the Ten Commandments will "physically dwarf" and "physically dominate" the other elements of the display, and is the "predominate element in the display." (App.28, 32). The court stated that the currently existing monuments and markers in the garden area do not "contribute" to the display's secular message, and that the proposed display is not held together by a "unifying theme." (App.30). On this basis, the court concluded that the proposed display had the effect of endorsing religion under the second part of the *Lemon* test. (App.33).

Judge Batchelder dissented from the panel's decision. (App.34). Judge Batchelder reasoned that the case is not ripe for adjudication under Article III of the U.S. Constitution. (App.35). Judge Batchelder specifically noted that because the display does not exist, the respondents failed to demonstrate "that the harm they complain of will ever come to pass." (App.40). Noting that "Section 8 contains no description of the content of the 'historical and cultural display' into which the monument is to be incorporated," the court was "left to speculate about whether that display will be sufficiently historical and cultural." (App.40). Finally, Judge Batchelder stated that the plaintiffs would

suffer no hardship if relief were denied: "[i]n the absence of any specific evidence detailing the composition of the display mandated by Section 8, we can only speculate whether in its final form that display will offend the Constitution." (App.41). For this reason, Judge Batchelder concluded that "[a] case requiring this kind of speculation for its resolution is not ripe for review." (App.42). Petitioner filed for rehearing and rehearing *en banc*. The panel declined rehearing, and the Sixth Circuit denied rehearing *en banc*. (App.55).

REASONS FOR GRANTING THE WRIT

A court attempting to examine the appearance and context of a display that is proposed but not yet installed is making a constitutional decision on the basis of speculation and conjecture. It is entangling itself in abstract disagreements premised on contingent future events that may not occur as anticipated, or may not even occur at all. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993). A Federal court inevitably becomes ensnared in this conflict when it must decide the facial constitutionality of a state statute calling for a historical display containing a religious symbol before the state has the opportunity to design or install the display. This Court in *Allegheny v. ACLU* requires courts to establish the effect of the display based on its appearance and surrounding context. *Id.* at 597; *see Lemon v. Kurtzman,* 403 U.S. 602 (1971) (establishing the *Lemon* test that determines when a government act violates the Establishment Clause). Without knowledge of these facts, the Federal court is in the awkward position of arbitrarily predicting the "worst"

or "best-case scenario" and deciding the constitutional question on the basis of that conjecture.

This conflict between the fact-intensive scrutiny of the *Lemon* test and an unimplemented state statute is a serious flaw in Establishment Clause jurisprudence. Decisions made on the basis of speculation and conjecture threaten this Court's precedent. Without the factual record as a guide, courts effectively are invited to answer political questions on the basis of the various motives of individual legislators, the religious content of the symbol in isolation, or the religious inclinations of the parties involved. These speculative opinions provide no guidance to Federal courts in subsequent cases because they fail to flesh out the contours of the Establishment Clause, and effectively reduce the constitutional analysis to a game of chance.

To address this inevitable conflict, this Court should hold a state enactment constitutional on its face where the express language of the enactment declares the state's valid secular purpose and specifically requires a secular effect. This standard of review in a facial challenge is derived from First Amendment speech jurisprudence involving facial challenges to state statutes regulating both conduct and speech. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In these cases, this Court holds state statutes regulating speech and conduct facially constitutional if the language of the statute encompasses a broad range of constitutionally proscribable conduct. *Id.* at 615. Likewise, a state enactment involving the public display of a religious symbol should be constitutional on its face where the statute may be enacted in myriad constitutional ways.

Basic principles of Federalism dictate that when a state legislature expresses its intention to comply with the

Establishment Clause, the state's expression of legislative intent is entitled to deference. Deferring to the state legislature in this narrowly-defined case prevents Federal courts from addressing cases that are not ripe for judicial determination, and permits courts to postpone the fact-intensive constitutional analysis until the record is fully developed. This result comports with this Court's mandate under the First Amendment that violations of the Establishment Clause are detected only by careful scrutiny of the specific facts of each individual case.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY HOW THE FACT-INTENSIVE INQUIRY OF THE ESTABLISHMENT CLAUSE APPLIES IN A FACIAL CHALLENGE TO AN UNIMPLEMENTED STATE STATUTE CALLING FOR A PUBLIC DISPLAY CONTAINING A RELIGIOUS SYMBOL.

1. In a facial challenge to an unimplemented state statute calling for a secular public display containing a religious symbol, courts must speculate as to the appearance and context of the proposed display to determine its constitutionality under the *Lemon* test.

The Establishment Clause of the First Amendment, made applicable to states through the Fourteenth Amendment, *see Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), provides that "Congress shall make no law respecting an establishment of religion. . . . " In *Lemon v. Kurtzman*, 403 U.S. at 602, this Court held that an act of government violates the Establishment Clause when (1) the act has no valid secular purpose, (2) its primary effect

advances or inhibits religion, or (3) it fosters excessive government entanglement in religion.

When the government displays a religious symbol on public property, the second and third parts of this test become an intensely fact-driven inquiry. *Allegheny,* 492 U.S. at 595. Specifically, a publicly displayed religious symbol violates the Establishment Clause when a reasonable person viewing the actual display in its "particular physical setting" believes the government is endorsing religion. *Id.* This fact-intensive inquiry comports with the mandate of the Establishment Clause that "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Id. citing Lynch v. Donnelly,* 465 U.S. 668, 694 (1984). The actual appearance of the display is critical because "the effect of the government's use of religious symbolism depends on its context." *Allegheny,* 492 U.S. at 597.

It is practically impossible to apply the fact-driven analysis of the Establishment Clause in a facial challenge to a state statute calling for the public display of a religious symbol. Where the proposed display does not yet exist, courts cannot determine how it is designed, how it appears in relation to other objects, or whether the state has achieved its secular goals. There are no facts that show the size and location of the display, its overall theme, or how it appears to passersby. In short, the court has nothing to examine but a mere expression of legislative intent.

A court that attempts to consider the facts in this circumstance inevitably ends up creating them. Because the record is not sufficiently developed, the court is in the awkward position under *Lemon* of speculating as to the

display's appearance and context. To determine how the reasonable person would view the display, the court must imagine its design, theme, size, location, visibility, organization and message when none of these facts exists in the record. Courts ultimately speculate as to the elements and composition of the display. As a result, the court's decision is made on the basis of "what might be" rather than "what is." Nothing in *Lemon* prevents a court from projecting the "worst case scenario" and striking the statute on that basis.

2. A court that is speculating as to the appearance of a display in order to determine its constitutionality is deciding a case that is not ripe for judicial determination.

The use of speculation and conjecture in applying *Lemon* to an unimplemented legislative enactment creates a small but serious fissure in this Court's Establishment Clause jurisprudence. This Court specifically has stated that the constitutionality of a publicly displayed religious symbol must be decided on the specific facts of each individual case. *Lynch,* 465 U.S. at 678-679 (1984) ("The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phase or test."). When a court instead conducts a context-intensive inquiry in a case with no context, it is not deciding a case or controversy as required by Article III of the U.S. Constitution. It is deciding a case that is not ripe for judicial review.

The ripeness doctrine " 'prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements,' when those 'disagreements' are

premised on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *see Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). The ripeness doctrine also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). A case is not ripe for review when (1) the issue before the court is not fit for judicial decision; (2) there is no hardship to the parties in withholding the court's consideration; and (3) the court would benefit from further factual development of issues presented. *Abbott Laboratories*, 387 U.S. at 148-149.

The present case illustrates how a facial challenge to an unimplemented state statute calling for the public display of a religious symbol is not ripe for judicial review under *Lemon*. The language of Senate Joint Resolution 57 clearly and unambiguously expresses the legislature's valid secular purpose. The resolution calls for a historical display containing a monument of the Ten Commandments for the express purpose of "illustrating how the Bible and Ten Commandments have influenced the faith, morals, and character of American leaders who, in turn, have shaped American law, public policy, and institutions." (App.64). The resolution expressly prohibits displaying the Ten Commandments for religious purposes (App.64), and requires that the Ten Commandments be "incorporated into an historical display along with other historic documents as described in KRS 158.195," (App.63-64), on the mandate that "the purpose of the display shall not be to advance religion." (App.64).

No single provision in the resolution, however, describes the display with specificity. (App.57). No provision limits the number, size or placement of the individual components of the display. (App.57). Except to require a cultural and historical message, the resolution does not suggest, dictate or limit the size, organization or appearance of the overall display. (App.57). Although the resolution mandates the incorporation of numerous historical documents listed in KRS 158.195, (App. 66), it does not describe or limit the number of monuments, markers and documents that ultimately may be used by the Commonwealth to form the display. (App.57). Section 8 only states that the Ten Commandments is to be made "part of a cultural and historical display." (App.65).

According to this language, the Commonwealth may create a large number of displays that comport with the Constitution. The display may illustrate the religious, philosophical and moral influences on the nation's founding fathers. It may exhibit documents and other material that played a prominent role in the history of Kentucky. The Commonwealth may even decide to recreate the exhibit at the Library of Congress entitled *Religion and the Founding of the American Republic,* a portion of which is dedicated to "The Great Revival in Kentucky." *See Religion and the New Republic,* Religion and the Founding of the American Republic, Library of Congress, http://lcweb.loc.gov/exhibits/religion/rel07.html.

The lower court agreed that the Ten Commandments may be displayed constitutionally:

> [W]e believe that the Supreme Court's opinion in *Stone* and Justice Stevens' statements in *Allegheny not only acknowledge that the Ten Commandments may be constitutionally displayed,*

> they provide considerable guidance how they can be displayed . . . *we are confident that with careful planning and deliberation . . . the Commonwealth can permissibly display the monument in question.*

(App.33-34) (emphasis added).

However, because the Commonwealth has not yet decided its precise contours, the court could not possibly examine the "actual display" in its "surrounding context" to determine whether the reasonable viewer would believe the government has endorsed religion. This determination under the "effects" part of the *Lemon* test can be reached only on the basis of a complete description of the Ten Commandments exhibit and the overall cultural and historical display. Without this description, the court is required to guess as to facts not contained in the record. Because the court requires "further factual development of issues presented" to know the effect of the proposed display under SJR 57, this case is not fit for judicial determination. *See, e.g., Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726 (1998).

The respondents will suffer no hardship if the court withholds consideration of the unimplemented statute. The respondents do not complain that they are injured or harmed by the resolution. (R.1, 2, 3). They claim instead that they will come into frequent, direct and unwelcome contact with the monument during the course of their normal routines. (R.1, 2, 3). They complain that the Ten Commandments monument would have a predominately religious effect, and that they are offended by the display. (R.1, 2, 3). The respondent's injuries clearly are speculative. No party to this litigation would be harmed if the

court decided to determine the constitutionality of the display at the time of its installation.

The constitutional determination of the "effect" of the proposed display, therefore, is not ripe for judicial review under Article III of the U.S. Constitution. The precise elements of this display have not been formalized so that its effects may be felt "in a concrete way by the challenging parties." *See, e.g., Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993). If the court attempts to determine the "effect" of the proposed display called for by SJR 57, it will become entangled in an abstract disagreement "premised on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.*

3. Constitutional decisions based on speculation create poor legal precedent and do not comport with the fact-intensive analysis of the Establishment Clause.

The fact-intensive inquiry under *Lemon's* "effect" test practically invites courts to consider intensely political considerations such as the individual motives of state legislators, the religious content of the symbol in isolation, or the religious or non-religious inclinations of the parties involved. A judicial opinion addressing what only can be described as a political question is poor legal precedent. As this Court stated in *Allegheny*: "the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases." *Id.* at 606.

This Court, therefore, should grant certiorari and hold that a state enactment calling for the public display containing a religious symbol is constitutional on its face

when the express language of the enactment states a valid secular purpose and specifically requires a secular display. Basic principles of federalism dictate that a state's promise to comply with the Establishment Clause is entitled to deference until the facts show that it has failed to meet its constitutional obligations. In other words, when the express language of the resolution requires the Commonwealth to create a historical display, a court simply cannot conclude that it will refuse to do so.

4. A state legislative enactment calling for a public display containing a religious symbol should be constitutional on its face when it expresses a valid secular governmental purpose, specifically requires a secular display, and may be applied in myriad constitutional ways.

The standard to be applied to a facial challenge to a state enactment calling for a publicly displayed religious symbol should be identical to the First Amendment overbreadth doctrine governing statutes that regulate both conduct and speech. When speech is involved, the overbreadth doctrine permits plaintiffs to raise hypothetical scenarios in which the statute could be applied unconstitutionally by the state. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). However, even in the special circumstance where the plaintiff is permitted to raise imagined injuries of others not before the court, the statute's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. In short, despite the plaintiff's special standing under the First Amendment, a statute that can be implemented in any number of constitutional ways is constitutional on its face. *Id.* Similarly, a legislative enactment calling for the public display of a religious symbol with an expressly secular

purpose and effect should be constitutional on its face when it may be applied in myriad constitutional ways.

Courts should defer to legislatures only in narrowly defined cases like the present where a state enactment calling for the public display of a religious symbol is challenged on its face, and its express language clearly and unambiguously (1) expresses a valid secular legislative purpose, and (2) calls for a secular display. Statutes that do not contain express language stating the legislature's secular purpose and proposed secular effect are not entitled to the same presumption of facial validity. For example, in *Stone v. Graham*, 449 U.S. 39 (1980), this Court considered a facial challenge to a state statute requiring the superintendent of education to post the Ten Commandments on schoolroom walls. *Id.* The statute, however, contained neither an express statement of secular purpose, nor did it require a secular context. Lack of express purpose and effect in this case was a fatal defect in the statute because courts will not perform the job of the legislature by adding language missing from a statute that is necessary to render it constitutional. *See Aptheker v. Secretary of State,* 378 U.S. 500, 515 (1964).

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) is not inapposite. There this Court considered a school policy adopting student-led invocations before high school football games. *Id.* The Court found the policy unconstitutional because its express purpose was religious and therefore invalid. *Id.* at 306-307. According to the Court an "invocation" is by definition religious. *Id.* In contrast, the legislative purpose in Senate Joint Resolution 57 is secular. This Court has noted specifically that commemorating our nation's religious foundations is a valid secular purpose under the Establishment Clause.

Lynch, 465 U.S. at 674 ("[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."); *id.* ("[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.").

5. Holding a mere expression of legislative intent constitutional on its face prevents Federal courts from having to judge policy decisions of state legislatures on the basis of no discernable judicial standard, comports with the fact-intensive inquiry of the Establishment Clause, and eliminates cases that are not ripe for judicial review.

Deferring to a statute that by its terms expresses a secular purpose and effect in compliance with the Establishment Clause delivers courts from examining cases that are not ripe for review under *Lemon's* "effects" test. The standard properly preserves *Lemon's* fact-intensive inquiry until the record is sufficiently developed. Holding a state legislative expression of intent constitutional on its face when it mandates compliance with the Establishment Clause properly focuses the court's analysis on the individual facts of each case on a case-by-case basis. Each case decided, therefore, generates valuable precedent for subsequent cases and gives life and definition to the Establishment Clause.

Deferring to a state legislature's expression of its intent to comply with the Constitution also properly reflects the role of Federal courts in our democracy. Federal courts should not be required to establish constitutional facts on the basis of speculation. *Cf.* Davis,

Administrative Law Treatise, § 15.12 (3d ed. 1994). They should not be compelled to reexamine public policy choices of state legislatures based on conjecture in direct contravention of the express language of a state statute or resolution. *Id.*

At a minimum, deferring to a statute that expressly requires constitutional compliance properly assumes the petitioner in this case will perform his duties as required by state law and the Federal constitution, *cf. United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (in the absence of clear evidence to the contrary, the doctrine of regularity presumes that public officers have properly discharged their official duties), and limits the court's facial review to the express terms of the enactment. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (reviewing court should not defer to position that is contrary to legislative intent expressed in unambiguous terms).

Courts, therefore, should defer to an express statement of legislative intent to comply with the Establishment Clause when that statement is the sole subject of the court's consideration. The Establishment Clause requires courts to examine the actual appearance and context of a publicly displayed religious symbol to decide its constitutionality. When the proposed display has not yet been installed, the government's clear and unambiguous statement of intent to create a secular display is entitled to deference. Currently, a state statute regulating both speech and conduct is constitutional on its face under the First Amendment if it covers a broad range of constitutionally proscribable conduct. A state statute calling for the public display of a religious symbol in a secular context for a secular purpose should be entitled to the same

measure of judicial deference under the First Amendment when it may be implemented in any number of constitutionally permissible ways.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant review in this case to reverse the holding of the Sixth Circuit Court of Appeals and hold Senate Joint Resolution 57, Section 8 constitutional on its face.

Respectfully submitted,

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307 F.3d 471

United States Court of Appeals,
Sixth Circuit.

Rabbi Jonathan **ADLAND**; Reverend Johanna Bos; Reverend James Jerrell Greenlee; Reverend Gilbert Schroerlucke; Jeff Vessels; and American Civil Liberties Union of Kentucky, Plaintiffs-Appellees,

v.

Armond **RUSS**, in his official capacity as Commissioner of the Department for Facilities Management, Defendant-Appellant.

No. 00-6139.

Argued Nov. 2, 2001.
Decided and Filed Oct. 9, 2002.
Rehearing and Suggestion for Rehearing En Banc Denied Nov. 22, 2002.*

David A. Friedman (argued and briefed), American Civil Liberties Union of Kentucky, General Counsel, Louisville, KY, C. Laurie Griffith (briefed), Griffith Law Offices, Louisville, KY, for Plaintiffs-Appellees.

Scott White (briefed), Jennifer L. Carrico (argued and briefed), Office of the Attorney General, Frankfort, KY, for Defendant-Appellant.

Edward L. White, III, Thomas More Center for Law & Justice, Ann Arbor, MI, for Amicus Curiae.

Edna J. Turner, *Theodore H. Amshoff, Jr.*, Amshoff & Amshoff, Louisville KY, for Defendants.

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* Judge Batchelder would grant rehearing for the reasons stated in her dissent.

Before: *MARTIN*, Chief Circuit Judge; *BATCHELDER*, Circuit Judge; *SARGUS*, District Judge.*

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge.

On April 21, 2000, Kentucky Governor Paul E. Patton signed into law Senate Joint Resolution No. 57, a resolution "relating to the display of historic documents that include a depiction of the Ten Commandments." The Resolution contains two primary substantive provisions – Section 2, which authorizes a public school teacher to post the Ten Commandments in a classroom when incorporated into a historical display, and Section 8, which directs the Department for Facilities Management to "relocate the monument inscribed with the Ten Commandments which was displayed on the Capitol grounds for nearly three decades to a permanent site on the Capitol grounds near Kentucky's floral clock to be made part of a historical and cultural display including the display of this order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." Plaintiffs, Rabbi Jonathan Adland, Reverend Johanna Bos, Reverend James Jerrell Greenlee, Reverend Gilbert Schroerlucke, the American Civil Liberties Union of Kentucky and its executive director Jeff Vessels, filed suit seeking to permanently enjoin the defendant Armand Russ, Commissioner of the Commonwealth of Kentucky Department for Facilities Management, from complying with Section 8. By agreement of the

* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

parties, the district court heard the matter on the merits. In a careful and thoughtful opinion, the district court declared Section 8 of Kentucky Senate Joint Resolution Number 57 unconstitutional under the Establishment Clause of the First Amendment and permanently enjoined the defendant from complying with Section 8. We AFFIRM.

I.

A.

The Ten Commandments monument was presented to the Commonwealth by the Fraternal Order of Eagles, a national service organization dedicated to promoting liberty, truth and justice, in 1971.[1] In offering to donate the monument to the Commonwealth, the Eagles explained in a March 14, 1971, letter that:

> Most of today's younger generation either have not seen the Ten Commandments or have not been taught them. In our opinion the youth of today is in dire need of learning the simple laws of

[1] As recounted in a Seventh Circuit decision addressing an Establishment Clause challenge to an identical Ten Commandments monument in Elkhart, Indiana, the original impetus for the Eagles' nationwide donation of Ten Commandments monuments came from E.J. Ruegmer, a juvenile court judge in Minnesota. *Books v. City of Elkhart, Indiana,* 235 F.3d 292, 294 (7th Cir.2000), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001); *see also Summum v. City of Ogden,* No. 01-4022, 2002 WL 1609753, at *1 (10th Cir. July 19, 2002). Judge Ruegmer was disillusioned by juvenile crime and believed that the Ten Commandments could provide a common code of conduct. *Id.*

God if we are to attain love and charity necessary to create peace among the peoples of all nations.

The granite monument, which is over six feet tall and almost four feet wide, bears an inscription of the following version of the Ten Commandments:

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shall not commit adultery.

Thou shall not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house.

Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

At the top of the monument, there are two small tablets containing ancient Hebrew script. Surrounding these tablets is a floral design, and between the tablets is the all-seeing eye, similar to the one depicted on the dollar

bill. Immediately below the eye is an American eagle grasping the American flag. Below the text of the monument are two small Stars of David, and in the center of the stars is a similarly-sized symbol representing Christ: two Greek letters, Chi and Rho, superimposed upon each other. At the base of the monument is a small scroll, which reads: "Presented to the Commonwealth of Kentucky by Kentucky State Aerie Fraternal Order of Eagles 1971."

Contrary to the statement in Section 8 of the Resolution, the district court found that the monument was displayed on Capitol grounds until approximately 1980. It was removed to make room for construction on the Capitol grounds and has remained in storage since that time.

B.

The Resolution contains a preamble consisting of seventeen "Whereas" clauses that recite the Senate's purpose in enacting this Resolution. Ten of the clauses quote famous Americans – Samuel Adams, Fisher Ames, George Washington, Andrew Jackson, John Quincy Adams, Abigail Adams, Woodrow Wilson, and Jimmy Carter – professing their beliefs in the Bible, God, or Christianity. For example, the Resolution quotes Andrew Jackson's May 29, 1845, statement:

> My lamp of life is nearly out, and the last glimmer has come. I am ready to depart when called. The Bible is true. The principles and statutes of that Holy Book have been the rule of my life, and I have tried to conform to its spirit as nearly as possible. Upon that sacred volume I rest my hope for eternal salvation, through the merits and blood of our blessed Lord and Savior, Jesus Christ.

Similarly, the Resolution quotes George Washington's September 19, 1796, declaration: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." The Resolution also quotes Woodrow Wilson's statement:

> The Bible is the word of life. I beg that you will read it and find this out for yourselves. . . . You will find it full of real men and women not only, but also of things you have wondered about and had been troubled about all your life, as men have been always; and the more you read, the more it will become plain to you what things are worthwhile and what are not, what things make men happy – loyalty, right dealings, speaking the truth, readiness to give everything for what they think their duty, and most of all, the wish that they may have the real approval of the Christ, who gave everything for them. . . . When you have read the Bible, you will know it is the Word of God, because you will have found it the key to your own heart, your own happiness, and your own duty.

In addition, the Resolution also employs quotes from a 1892 United States Supreme Court decision which, viewed in isolation, conclude that the Supreme Court has declared the United States to be a "Christian nation." Four other clauses incorporate miscellaneous quotations regarding God or the Bible in pre-Revolutionary legislative sources or in Kentucky law. One of the clauses also references the presence of the Ten Commandments in the United States Supreme Court chambers as part of a frieze containing several historical law givers.

Section 8 of the Resolution directs that the monument be relocated to the Capitol grounds, the seat of the

Commonwealth's government, near Kentucky's Floral Clock, a large clock planted with 13,000 Alternanthera and Santolina plants. The clock is thirty-four feet in diameter and weighs 200,000 pounds, and according to the Commonwealth, it is one of the largest clocks in the world. The Floral Clock area is a prominent and central feature on the Capitol grounds which can be seen from the circular drive leading up to the Capitol plaza and the public parking area.

According to Section 8, the Ten Commandments monument will be part of a "historical and cultural display." The Resolution does not delineate the specific components of this display, but the Commonwealth in its brief clarifies that this display will consist of the "markers, signs and monuments" in the "historical garden area surrounding the Kentucky Floral Clock." (Appellant's Brief at 7). These markers include: (1) a Kentucky Historical Society memorial sign commemorating "A Civil War Reprisal" and describing in detail a Kentucky Civil War event on the location; (2) a "Welcome to Kentucky" bronze plaque; (3) the Kentucky Coffee Tree Marker commemorating Joe Cross Creason, Sr., humorist, author and journalist; (4) the Freedom Tree Marker memorializing Kentucky Vietnam Prisoners of War; (5) a stone marker in memory of Charles Wickliffe, Finance and Administration Cabinet, 1960-1995; (6) a plaque in memory of Governor Bert Combs, in recognition of courageous leadership, 1959-1963; and, (7) a memorial for John Stony Spicer, Physical Plant Director, 1958-1988. As the Commonwealth states in its reply brief, "Together with these surrounding markers and memorials, the monument will be one 'part of a historical and cultural display' established by the Resolution." (Appellant's Reply Brief at 10-11).

If the Ten Commandments monument was re-located to this area it would be the largest monument in the area, except for the Floral Clock. Both the Floral Clock and the Ten Commandments monument would be visible to motorists driving on the road between the Capitol and the Capitol Annex.

II.

In reviewing a district court's grant of a permanent injunction, we review the district court's conclusions of law and its findings of constitutional, or ultimate, facts *de novo*. *See Grutter v. Bollinger,* 288 F.3d 732, 743 (6th Cir.2002). We review the district court's findings of subsidiary facts for clear error. *Deja Vu v. Metro. Gov't of Nashville,* 274 F.3d 377, 389 (6th Cir.2001). Factual findings are clearly erroneous only if this court is "left with the definite and firm conviction that a mistake has been committed." *United States v. Hopkins,* 295 F.3d 549, 551 (6th Cir.2002).

III.

In the district court, the defendant argued that the plaintiffs lacked standing to pursue this action. Although they do not raise this argument on appeal, we must nevertheless verify that the plaintiffs had standing to pursue this action in the district court. *See Harker v. Troutman (In re Troutman Enters., Inc.),* 286 F.3d 359, 364 (6th Cir.2002) ("Standing is a jurisdictional element and we are under a continuing obligation to verify our jurisdiction over a particular case."); *see also CDI Info. Servs. v. Reno,* 278 F.3d 616, 618 (6th Cir.2002) (noting that it is

"incumbent" on the court "to verify the existence of subject matter jurisdiction").

In order to meet Article III standing requirements, a party must show (1) actual or threatened injury which is (2) fairly traceable to the challenged action and (3) a substantial likelihood the relief requested will redress or prevent the plaintiff's injury. *Deja Vu,* 274 F.3d at 384. In *Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679, 681 (6th Cir.1994), we held that a high school graduate had standing to challenge his high school alma mater's display of a portrait of Jesus Christ because he continued to visit the school and encounter the portrait. We noted that "[t]he use of governmental authority to encourage a sectarian religious view is a sufficient injury if directed toward the plaintiff." *Id.* at 682; *see also Suhre v. Haywood County,* 131 F.3d 1083, 1088 (4th Cir.1997) ("The cognizable injury caused by personal contact with a public religious display may thus satisfy the injury-in-fact requirement for standing to bring an Establishment Clause case."); *Murray v. City of Austin,* 947 F.2d 147, 151 (5th Cir.1991) (ruling that plaintiff had standing to challenge City's inclusion of a cross in municipal logo); *Saladin v. City of Milledgeville,* 812 F.2d 687, 691-93 (11th Cir.1987) (holding that plaintiffs had standing because plaintiffs were directly confronted by presence of word "Christianity" on the city seal.) An Establishment Clause plaintiff need not allege that he or she avoids, or will avoid, the area containing the challenged display. As the Fourth Circuit noted:

> Compelling plaintiffs to avoid public schools or buildings is to impose on them a burden that no citizen should have to shoulder. A public school or county courthouse exists to serve *all* citizens of a

> community, whatever their faith may be. Rules of standing that require plaintiffs to avoid public places would make religious minorities into outcasts. Forcing an Establishment Clause plaintiff to avoid the display of which he complains in order to gain standing to challenge it only imposes an extra penalty on individuals already alleged to be suffering a violation of their constitutional rights.

Suhre, 131 F.3d at 1088.

The complaint, which the individual plaintiffs each verified, indicates that Rabbi Adland, Reverend Bos, Reverend Greenlee, Reverend Schroerlucke and Executive Director Vessels frequently travel to the State Capitol to engage in political advocacy for a variety of organizations and that they will endure direct and unwelcome contact with the Ten Commandments monument. In light of *Washegesic,* we conclude that the plaintiffs satisfy the injury-in-fact requirement. We also find that the this injury is plainly caused by the defendant's statutory directive to erect the Ten Commandments and that an injunction can redress plaintiffs' injury. Thus, we are satisfied that the individual plaintiffs had standing to pursue this action in the district court.

As to the American Civil Liberties Union, an organization has standing to sue on behalf of its members "when (a) its members otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm.,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). First, various members of the

American Civil Liberties Union travel to the Capitol, all of whom would come into direct, unwelcome contact with the monument. Second, according to a declaration attached to the complaint, the ACLU advocates the separation of church and state and has "devoted substantial effort and resources to defending what Thomas Jefferson called 'the wall of separation between church and state' created by the two religion clauses of the First Amendment." Thus, this suit furthers the organization's interest. Third, there does not appear to be any basis to require the participation of all 1,800 Kentucky ACLU members. Accordingly, we find that the ACLU had organizational standing to seek relief in the district court.

IV.

The Establishment Clause of the First Amendment, made applicable to states through the Fourteenth Amendment, *see Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947), provides that "Congress shall make no law respecting any establishment of religion." U.S. Const., Amend. I. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)).

Whether a particular government action violates the Establishment Clause depends on the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29

L.Ed.2d 745 (1971). While we have recognized that individual Supreme Court justices have expressed reservations regarding the *Lemon* test, *see American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 & n. 15 (6th Cir.2001) (collecting opinions), we are an intermediate federal court and are bound to follow this test until the Supreme Court explicitly overrules or abandons it. *See Grutter*, 288 F.3d at 743.

Under the *Lemon* test, we consider whether (1) the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105. Although this remains the original formulation, we have recognized that in recent years, the Supreme Court has applied what is known as the "endorsement" test, which looks to whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government. *See Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999) (collecting cases); *Hawley v. City of Cleveland*, 24 F.3d 814, 817 (6th Cir.1994). While we have variously interpreted the endorsement test as a refinement or modification of the first and second prongs, *see American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561, 1563 (6th Cir.1986), a clarification of the first prong, *see Chaudhuri v. State of Tennessee*, 130 F.3d 232, 236 (6th Cir.1997), and as a modification of the entire *Lemon* test, *see Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 678-79 (6th Cir.1994) *aff'd*, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), we follow our en banc decision in *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir.1992), and

the recent panel decisions in *Brooks v. City of Oak Ridge,* 222 F.3d 259, 264 (6th Cir.2000), *cert. denied,* 531 U.S. 1152, 121 S.Ct. 1097, 148 L.Ed.2d 970 (2001), and *Granzeier,* and treat the endorsement test as a refinement of the second *Lemon* prong.

A.

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard,* 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (quoting *Lynch,* 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring)). Such an intention to promote religion is plain when the State enacts a law to serve a religious purpose, either through the promotion of religion in general or the advancement of a particular religious belief. *Id.* Although a "totally secular purpose is not required," *City of Birmingham,* 791 F.2d at 1565, it is clear that the secular purpose "requirement is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch,* 465 U.S. at 690-91, 104 S.Ct. 1355 (O'Connor, J., concurring). While we accord some deference to the Commonwealth's avowed intention, it nevertheless remains our task to "distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

In *Stone v. Graham,* 449 U.S. 39, 41-42, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam), the Supreme Court summarily struck down a Kentucky statute requiring schools to post copies of the Ten Commandments in each classroom. Each display of the Ten Commandments was to be posted with the statement: "The secular application of

the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 41, 101 S.Ct. 192 (quoting 1978 Ky. Act, ch. 436, § 158.178 (1980)). The Court rejected this avowed secular purpose, explaining that: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to the fact." *Id.* at 41, 101 S.Ct. 192; *see also Books v. City of Elkhart, Indiana,* 235 F.3d 292, 302 (7th Cir.2000), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001) (finding that the Ten Commandments, standing alone, cannot be stripped of "their religious, indeed sacred, significance and characterized as a moral or ethical document"); *see generally School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.E.2d 844 (1963) (holding unconstitutional a statute "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison," despite the proffer of such secular purposes as "the promotion of moral value, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."). The Ten Commandments "do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness." *Stone,* 449 U.S. at 41-42, 101 S.Ct. 192 (internal citations omitted). "Rather the first part of the Commandments concerns the religious duties of believers; worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 42, 101 S.Ct. 192. Although it rejected Kentucky's avowed secular purpose, *Stone* acknowledged that the Ten Commandments could be

integrated into a school curriculum as part of a larger study of "history, civilization, ethics, comparative religion" and similar subjects. 449 U.S. at 42, 101 S.Ct. 192.

Section 8 provides that the Commonwealth intends to display the Ten Commandments "to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth."[2] In light of *Stone,* we are compelled to conclude that this avowed secular purpose, which is essentially the same secular purpose that the Commonwealth of Kentucky put forth in *Stone,* is insufficient, standing alone, to satisfy the secular purpose requirement. This does not end our inquiry, however, for as the Supreme Court recognized in *Stone,* context is critically important in evaluating a state's proffered secular purpose. *See id.; see also Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 771 (7th Cir.2001), *cert. denied,* 534 U.S. 1162, 122 S.Ct. 1173, 152 L.Ed.2d 117 (2002) ("Beyond assessing the purpose expressly articulated by the state, we ensure that the stated secular purpose is legitimate by also examining the context and the content of the display."). In assessing the Commonwealth's avowed secular purpose, we look to (1)

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[2] In its brief, the defendant relies primarily on the language of Section 2, which deals with displays of the Ten Commandments in public school classrooms, in emphasizing its secular purpose. Its primary brief makes repeated references to the purpose set forth in Section 2 – "illustrating how the Bible and Ten Commandments have influenced the faith, morals, and character of American leaders who, in turn, have shaped American law, public policy, and institutions" – but only a single reference to Section 8, the provision actually at issue. While we take note of the entire Resolution, including Section 2, in assessing context, our first inquiry into the Commonwealth's intent must be the secular purpose actually set forth in the challenged provision.

the language of Section 8; (2) the language of the entire Resolution, with particular attention to the preamble clauses; and (3) the intended physical context of the Ten Commandments monument.

1.

While Section 8 indicates that the Monument will be part of a cultural and historical display, the Resolution makes no mention of the other components of this display. Indeed, the Commonwealth did not reveal the contents of this display until it was in the midst of litigation. In our view, this indicates that the other components of the display are an afterthought, at best, secondary in importance to the Ten Commandments, and suggests that the Commonwealth acted with a predominantly religious purpose.

In examining Section 8, we also note that it codifies only the influence of the Ten Commandments on the law of the Commonwealth. Indeed, Section 7 of the Resolution states that the Commonwealth considers the Ten Commandments "to be *the* precedent legal code of the Commonwealth" (emphasis added). *Compare Books,* 532 U.S. 1058, 121 S.Ct. at 2211, 149 L.Ed.2d 1036 (Rehnquist, C.J., dissenting from denial of certiorari) (noting that the Commandments "have made *a* substantial contribution to our secular legal code") (emphasis added). In this respect, the Ten Commandments monument is unlike the frieze on the wall of the Supreme Court, which depicts Moses carrying the Ten Commandments alongside Confucius, Mohammed, Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall. *See Allegheny,* 492 U.S. at 652, 109 S.Ct. 3086 (Stevens, J., concurring in

part and dissenting in part). While the Commonwealth need not commemorate every arguable historical influence on the laws of the Commonwealth or keep current with the views of every scholar to ensure compliance with the Establishment Clause, we cannot ignore its decision to focus only on the "Biblical foundations" of the law. Of course, our concern is with religious liberty, not intellectual or academic orthodoxy. We have neither the desire nor the authority to resolve disputes about whether the Commonwealth's legal system owes more to the Magna Carta or the Code of Hammurabi than the Ten Commandments. But that said, in addressing the Commonwealth's avowed secular purpose for displaying an overtly religious symbol such as the Ten Commandments, we cannot ignore the Commonwealth's adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences. *See Books,* 532 U.S. 1058, 121 S.Ct. at 2211, 149 L.Ed.2d 1036 (Rehnquist, C.J., dissenting from denial of certiorari) (noting that the Commandments "have made a substantial contribution to our secular legal code").

2.

As to legislative context, the Resolution, which is to be posted on the Ten Commandments monument, sets forth a series of seventeen introductory "Whereas" clauses. Ten of these clauses include quotations from famous Americans extolling the virtues of religion, Christianity and the Bible. *Supra* Section I.B. These statements, as the defendant concedes, undoubtedly have a "religious meaning." (Rep. Br. at 13). Nevertheless, the defendant contends the preamble clauses are intended to "illustrate the religious thoughts of our nation's leaders and the Bible's influence

on law and public policy." According to the defendant, "[i]n that special function, the quotes and references achieve the Commonwealth's secular goal by commemorating how the Bible and Ten Commandments influenced a nation." The primary problem with the defendant's position is that it is notably absent from the preamble. Thus, even without assessing whether such a disclaimer could reduce the religious meaning contained in these statements, we are unpersuaded by the defendant's argument. By waiting until its reply brief to put forth a secular explanation for statements with an agreed religious meaning, the Commonwealth again suggests that its asserted secular justification is intended merely to avoid Establishment Clause liability rather than to actually further a legitimate secular purpose.

3.

Although Section 8 is silent as to the content of the "historical and cultural display," the defendant, in the course of this litigation, has clarified that the Ten Commandments will be displayed along with seven other signs or markers. *Supra* Section I.B. While the presence of these other secular symbols supports the defendant's claim of secular purpose more than a display that featured only the Ten Commandments would, the fact that the Ten Commandments monument physically dwarfs all of these other markers implies that they are secondary in importance to the Ten Commandments and suggests that the Commandments, and their religious message, are the primary focus of the display. *See O'Bannon,* 259 F.3d at 771 ("[T]he display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting a monument is primarily secular.").

In light of (1) the Supreme Court's recognition of the inherently religious nature of the Ten Commandments, *see Stone,* 449 U.S. at 41, 101 S.Ct. 192; (2) the Commonwealth's failure to identify the other components of the "cultural and historical display" referenced in Section 8 until litigation; (3) the Commonwealth's exclusive focus on the Ten Commandments as the source of Commonwealth law; (4) the overtly religious nature of the Resolution's preamble clauses; and (5) the fact that the Ten Commandments monument will be the largest in the display, we conclude that the Commonwealth has not established a secular purpose for the display of the Ten Commandments monument on the Capitol grounds.[3] *See also O'Bannon,*

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[3] In evaluating the Commonwealth's avowed secular purpose, we do not rely on the comments attributed to State Senator Albert Robinson in a February 16, 2000, Louisville Courier Journal article. *Cf. Wallace v. Jaffree,* 472 U.S. 38, 74, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring) ("It is particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute."). State Senator Robinson is quoted as having said: "When the boat came to these great shores, it did not have an atheist, a Buddhist, a Hindu, a Muslim, a Christian and a Jew . . . Ninety-eight percent plus of these people were Christians."

Similarly, we do not rely on the fact that the district courts in Kentucky have recently addressed a number of challenges to Ten Commandments displays. While it is certainly plausible that the Kentucky Senate's efforts to display the Ten Commandments were part of a larger Kentucky-wide campaign or part of a larger trend, there is not sufficient evidence in the record to link these various cases. *See American Civil Liberties Union v. Grayson County, Kentucky,* No. 4:01CV-202-M, 2002 WL 1558688, at *6 (W.D.Ky. May 13, 2002) (preliminarily enjoining display of Ten Commandments as part of "Foundations of American Law and Government" display in the Grayson County Courthouse); *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,* 145 F.Supp.2d 845, 853 (E.D.Ky.2001) (permanently enjoining display of Ten Commandments

(Continued on following page)

259 F.3d at 771 (rejecting avowed secular purpose of honoring history and honoring this country's legal system for display of Ten Commandments); *Books,* 235 F.3d at 304 (holding that defendant city's "avowed secular purpose of displaying the Ten Commandments issued on the eve of litigation 'is not sufficient to avoid conflict with the First Amendment.'") (quoting *Stone,* 449 U.S. at 41, 101 S.Ct. 192).

4.

In many instances, a state or local government considering the display of a monument or symbol with religious components faces a difficult decision. Such a display may provoke legal challenge, but the task of assessing whether such a display comports with the Establishment Clause is often an uncertain one hinging on the factual specifics of each case, and often times, the line between an unconstitutional display and a constitutional display will be quite narrow. *See Lynch,* 465 U.S. at 694, 104 S.Ct. 1355 (O'Connor, J., concurring) (noting that "[e]very government practice must be judged in its unique

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display in the McCreary and Pulaski County courthouses and the Harlan County schools); *Doe v. Musselman,* 96 F.Supp.2d 667 (E.D.Ky.2000) (preliminarily enjoining Ten Commandments display in public schools); *see also American Civil Liberties Union v. Rutherford County,* No. 3:02-0396, 2002 WL 1400202, at *13 (M.D.Tenn. June 21, 2002) (preliminarily enjoining display of the Ten Commandments as part of the "Foundations of American Law and Government" display in the Rutherford County Courthouse); *American Civil Liberties Union v. Hamilton County, Tennessee,* 202 F.Supp.2d 757, 767 (E.D.Tenn.2002) (declaring Hamilton County's display of the Ten Commandments at the Hamilton County Courthouse and the Hamilton County City Courts Building unconstitutional).

circumstances"); *Pinette,* 515 U.S. at 778, 115 S.Ct. 2440 ("Conducting the review of government action required by the Establishment Clause is always a sensitive matter."). Given the uncertainty with which state and local governments must often act, we believe that it is particularly appropriate to accord a measure of deference to a state or local government's avowed secular purpose and to refrain from hastily imputing unconstitutional motives to state legislators.

This case, however, does not present a situation where a state government, faced with considerable uncertainty regarding the constitutionality of a display with religious components, carefully deliberated to ensure that the display did not run afoul of the Establishment Clause. As to notice, the Commonwealth not only had the benefit of a Supreme Court case holding that the mere recitation of a secular purpose for the display of the Ten Commandments was not sufficient to pass Establishment Clause scrutiny, but the Commonwealth actually litigated the case. Instead of using *Stone* as a guidepost, the Commonwealth put forth virtually the same secular purpose in this case that the Court rejected in *Stone.* More importantly, instead of drafting a Resolution heeding *Stone's* suggestion to integrate the Ten Commandments into a broader study, the Resolution merely mentions an unspecified "cultural and historical display" and makes no effort to identify the components of the display. It may be that rejecting a government's avowed secular purpose is the exception rather than the rule, but on the facts of this case, we find that Kentucky's primary purpose in drafting Section 8 was religious rather than secular.

B.

Even if we were to disregard the Commonwealth's religious purpose in displaying the Ten Commandments, we would conclude that the Ten Commandments monument impermissibly endorses religion. While our examination of the Commonwealth's proffered purpose looks to the intended effect of the display, our inquiry into whether the display endorses religion examines its actual effect. *See Allegheny,* 492 U.S. at 596, 109 S.Ct. 3086. In evaluating whether the Ten Commandments display violates the Establishment Clause, we ask "whether an objective observer, acquainted with the text, legislative history, and implementation" of the enactment would view it as state endorsement of religion. *Santa Fe Indep. School Dist.,* 530 U.S. at 308, 120 S.Ct. 2266 (citations omitted); *American Civil Liberties Union v. Capitol Square Review & Advisory Bd.,* 243 F.3d 289, 302-03 (6th Cir.2001). In making this inquiry, we do not allow a state "to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Pinette,* 515 U.S. at 777, 115 S.Ct. 2440. Accordingly, we look to both the specific content of the display and the context of its presentation. *See Allegheny,* 492 U.S. at 598, 109 S.Ct. 3086.

1.

In *Lynch,* the Supreme Court ruled that a city's display of a Christmas creche in a park owned by a nonprofit organization as part of a holiday display which included a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, and a large banner reading "Seasons Greetings" did not violate

the Establishment Clause. 465 U.S. at 671, 681-84, 104 S.Ct. 1355. In a concurring opinion Justice O'Connor acknowledged that the creche was a symbol of religious significance but reasoned that the display, when considered in the context of the larger holiday setting, did not convey an endorsement of religion. *Id.* at 692, 104 S.Ct. 1355. Instead, the display celebrated a public holiday with strong secular components. *Id.*

Five years later, the Supreme Court addressed a similar Establishment Clause challenge to a Christmas creche located on a county courthouse staircase and a Chanukah menorah located in front of the city-county building. *See Allegheny,* 492 U.S. at 581-82, 109 S.Ct. 3086. Justice Blackmun, writing for a majority, concluded that the creche display violated the Establishment Clause, *id.* at 598-99, 109 S.Ct. 3086, and in a series of opinions, the Justices agreed that the menorah was constitutionally permissible, *see id.* at 613-620, 109 S.Ct. 3086 (Blackmun, J.); *id.* at 632-38, 109 S.Ct. 3086 (O'Connor, J., concurring); *id.* at 655-679, 109 S.Ct. 3086 (Kennedy, J., dissenting in part, concurring in part, joined by Rehnquist, C.J., White, J., Scalia, J.).

In declaring the creche display unconstitutional, the Court emphasized that the creche sent an "unmistakably clear" religious message and that "nothing in the context of the display detracts from the creche's religious message." *Id.* at 598, 109 S.Ct. 3086. According to the Court, the presence of Santa Claus and other Christmas decorations in other areas of the county courthouse "fail[ed] to negate the endorsement effect of the creche" because they were not part of the display. *Id.* at 598 n. 48, 109 S.Ct. 3086. Moreover, the floral display surrounding the creche only drew attention to the religious message of the display

and accordingly "contribute[d] to, rather than detract[ed] from, the endorsement of religion conveyed by the creche." *Id.* at 599, 109 S.Ct. 3086.

Analyzing the location of the creche, the Court also stressed the county courthouse was the seat of the county government and emphasized that the county placed the creche on the grand staircase, the "main" and "most beautiful part" of the building. *Id.* The Court explained: "No reasonable viewer could reasonably think that it occupies this location without the support and approval of government. Thus, by permitting the 'display of the creche in this particular physical setting,' the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *Id.* at 599-600, 109 S.Ct. 3086 (quoting *Lynch,* 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring) (footnote omitted)). As Justice O'Connor observed in her separate concurring opinion, "The display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or public perception, to status in the political community." *Id.* at 626, 109 S.Ct. 3086; *see also id.* at 650, 109 S.Ct. 3086 (Stevens, J., concurring) (asserting that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.").

Justice Blackmun, writing for himself, concluded that the display of the menorah was constitutional. According to Justice Blackmun, the menorah did not send an exclusively religious message, but rather had secular as well as religious dimensions. *Id.* at 613-14, 109 S.Ct. 3086. Moreover, he emphasized that the forty-five-foot Christmas tree, a secular symbol in Justice Blackmun's view, was the

"predominant element in the city's display" because of its size and its central position. *Id.* at 617, 109 S.Ct. 3086. While acknowledging that "no sign can disclaim an overwhelming message of endorsement," Justice Blackmun also noted that the sign proclaiming a salute to liberty diminished the possibility that the tree and menorah would be interpreted as a dual endorsement of religion. *Id.* at 619, 109 S.Ct. 3086.

Although she disagreed with Justice Blackmun's assessment of the menorah, Justice O'Connor also concluded that the display of the menorah did not violate the Establishment Clause. *Id.* at 632-36, 109 S.Ct. 3086. Justice O'Connor explained: "By accompanying its display of a Christmas tree – a secular symbol of the Christmas holiday season – with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635, 109 S.Ct. 3086.

2.

The Ten Commandments monument is prominently located at the very center of the Commonwealth's government – the State Capitol and site of all three branches of Kentucky government. The Commonwealth intends to position the Ten Commandments in the highly visible Capitol garden area, where it can be seen by motorists driving on the road between the Capitol and the Capitol Annex. Like the unconstitutional creche display in *Allegheny,* "[n]o viewer could reasonably think that it occupies this location without the support and approval of the

government." 429 U.S. at 600, 97 S.Ct. 869; *see also Books,* 235 F.3d at 305 ("[T]he seat of government "is so plainly under government ownership and control that every display on its property is marked implicitly with government approval."") (citation and internal quotation omitted); *Doe v. City of Clawson,* 915 F.2d 244, 249 (6th Cir.1990) (stating that the location of a Christmas creche at city hall implied that it had the "support and approval" of the city). And as in *Allegheny,* its prominent placement sends an unmistakable message that the Commonwealth of Kentucky endorses the religious message of the Ten Commandments.[4] The question, then, is whether the context of the display reduces or dilutes this endorsement.

3.

We agree with the Seventh Circuit's conclusion that the design of a monument in this manner emphasizes its religious message and compounds the endorsement inherent in the display of the Ten Commandments at the heart of state government. *See Books,* 235 F.3d at 302. The Ten Commandments occupy the bulk of the surface area and accordingly plainly dominate the monument. Moreover, if

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[4] Although plaintiffs contend that the Ten Commandments monument contains an exclusively Protestant version of the Ten Commandments, the Seventh Circuit's summary of the history of the monuments donated by the Eagles indicates that the version depicted on the monument was prepared with input from the Roman Catholic, Protestant and Jewish faiths. *Books,* 235 F.3d at 294-95. We need not resolve this factual dispute because it does not affect our conclusion in this case. *See Allegheny,* 492 U.S. at 615, 109 S.Ct. 3086 (Blackmun, J.) ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.").

an individual reads the monument, the first feature he or she would encounter would be the prefatory words "I AM the LORD thy God" set out in large lettering at the top of the text. The bottom of the monument also conveys an unambiguously religious message – it features two Stars of David and the Chi Rho Christ symbol. *See id.; see also Books,* 532 U.S. 1058, 121 S.Ct. at 2210, 149 L.Ed.2d 1036 (Stevens, J., respecting the denial of the petition for writ of certiorari) ("The graphic emphasis on those first lines [I AM the LORD thy God] is rather hard to square with the proposition that the monument expresses no particular religious preference – particularly when considered in conjunction with those facts that the dissent does acknowledge – namely, that the monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ.").

As a general matter, the inclusion of secular symbols in a display may dilute a message of religious endorsement. In this case, however, the monument's combination of revered secular symbols like the American flag and the Ten Commandment serves to link government and religion in an impermissible fashion. Thus, we also agree with the Seventh Circuit that the inclusion of an American eagle gripping the national colors at the top of the monument, serves to heighten the appearance of government endorsement of religion. *See* 235 F.3d at 307.

Additionally, we do not believe the fact that the monument indicates that the Eagles, a service organization, donated the monument reduces or dilutes the religious emphasis of the monument. It seems to us that a reasonable observer would know that the Eagles donated the monument with a religious purpose in mind – to teach

young people "the simple laws of God." *See Capitol Sq. Rev. & Advisory Bd.,* 243 F.3d at 303 (acknowledging that, as a matter of law, a reasonable observer is idealized to be better informed than average and aware of the origins of Ohio's motto). Even if such knowledge could not be directly imputed to a reasonable observer, such an observer would likely nevertheless infer from the plainly religious nature of the Ten Commandments that the monument was donated with a religious theme in mind.

4.

The Ten Commandments monument physically dominates the "historical and cultural display" in the Capitol garden area. First, as the district court noted, "the sheer dimensions of this granite monolith would dwarf all the other memorials to deceased veterans and dedicated public servants in the vicinity." 107 F.Supp.2d at 786. In this respect, the Commonwealth's intended display is unlike the holiday display upheld by the Supreme Court in *Allegheny.* As previously discussed, Justice Blackmun reasoned that the county could permissibly display the eighteen-foot menorah, a symbol he viewed as having important secular and religious dimensions, in part because the display was physically dominated by a forty-five foot Christmas tree, a secular symbol in Justice Blackmun's view. *Allegheny,* 492 U.S. at 617, 109 S.Ct. 3086 (Blackmun, J.). In this case, the religious symbol, the Ten Commandments, is the predominant element in the display. Accordingly, a reasonable observer is likely to believe that the religious message of the Ten Commandments is the dominant message of the display.

The Commonwealth argues the Floral Clock, one of the world's largest, counters the religious message of the monument. Notwithstanding the defendant's contention, it does not appear that the Commonwealth considers the Floral Clock to be part of the "cultural and historical display" identified in Section 8 of the Resolution. In its reply brief, the defendant states: "The display, which includes the monument and the resolution, will be dwarfed by the floral clock." (Rep. Br. at 21). In this respect, the Floral Clock is similar to the Christmas decorations and gallery forum in the Allegheny county courthouse. According to the Supreme Court, these features could not negate the endorsement effect of the creche because the record "demonstrate[d] that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building." *Allegheny,* 492 U.S. at 598 n. 48, 109 S.Ct. 3086; *cf. City of Clawson,* 915 F.2d at 249 (plaintiff acknowledged that the entire display included public library and its decorations).

Even if we considered the Floral Clock in our analysis, it is unclear how the clock could reduce the appearance of endorsement of the Ten Commandments' religious message. To be sure, the Floral Clock is visually and architecturally impressive, but it is unclear if it communicates any particular message to a viewer, let alone a cultural or historical message. The forty-five foot Christmas tree in *Allegheny,* displayed during the holiday season, obviously conveyed a primarily secular, holiday message to a viewer. *See* 492 U.S. at 616, 109 S.Ct. 3086 (Blackmun, J.); *id.* at 633, 109 S.Ct. 3086 (O'Connor, J., concurring). In this respect, the Christmas tree "emphasized the secular component of the message communicated by other elements of an accompanying holiday display, including the

Chanukah menorah." *Id.* at 617, 109 S.Ct. 3086. Without a clear historical or cultural message of its own, the Floral Clock would only draw attention to the Ten Commandments monument, the largest exhibit in the nearby display, and magnify the Commonwealth's endorsement of its religious message.

5.

In contrast to the holiday displays addressed by the Supreme Court in *Allegheny* and *Lynch,* and this Court in *City of Clawson,* the Commonwealth's display does not convey an easily discernible, unified theme to a reasonable observer. *See O'Bannon,* 259 F.3d at 773 (emphasizing absence of "unifying historical or legal significance" between display of the Ten Commandments and nearby monuments). Of the seven markers, three commemorate devoted civil servants, one commemorates a Kentucky humorist and writer, one welcomes visitors to Kentucky, one relates to the Civil War, and one memorializes prisoners of war and soldiers missing in action from the Vietnam War. Of this group, only one relates to a historical event before the twentieth century, and of the seven, only one, the marker commemorating journalist Joe Creason, celebrates a Kentuckian who has made cultural rather than governmental contributions. While all of the markers are important in their own right, and appropriately commemorate Kentucky's devoted civil servants, a reasonable observer will not be able to connect them to a unifying historical or cultural theme. In contrast, a reasonable observer who views a holiday display that features a Christmas creche along secular holiday symbols like Santa Claus, is likely to readily understand that the display conveys a holiday theme. Without a unifying theme to hold

the display together, a reasonable observer could only view the monuments separately. If a reasonable observer views the monuments separately, unconnected by a common context, his or her attention is naturally drawn to the Ten Commandments monument, the largest monument in the display, and its accompanying religious message.

6.

As we have noted throughout this opinion, the Ten Commandments convey a religious message, a message that cannot be diminished by a simple recitation that the display is not for religious purposes. *See Stone,* 449 U.S. at 42, 101 S.Ct. 192; *see also Allegheny,* 492 U.S. at 619, 109 S.Ct. 3086 (noting that "no sign can disclaim an overwhelming message of endorsement"). Nevertheless, the Commonwealth contends that the disclaimers set forth in the Resolution, which will be on display along with the Ten Commandments, sufficiently offset the religious message of the Ten Commandments. To the extent *Stone* has not already foreclosed this argument, we find that the disclaimer is ineffective and that the language of the Resolution emphasizes, rather than downplays, the religious nature of the monument.

Initially, we note that neither Section 8 nor the preamble clauses contain an explicit disclaimer that the display of the Ten Commandments is not intended to advance or promote religion. Thus, while the Commonwealth emphasizes that the Resolution expressly disclaims any religious purpose, these disclaimers are found in Section 2, the provision addressing the Ten Commandments in public schools, and Section 3, which concerns posting by a fiscal court, city council, or school board.

Instead of an express disclaimer, Section 8 provides an avowed statement of secular purpose. While such a statement may be sufficient to dilute religious endorsement, *see Brooks,* 222 F.3d at 266, the disclaimer implied in Section 8 is problematic. While it is not entirely clear how the Resolution will be portrayed on the display, the language of Section 8 is located on the very last page of the Resolution. Unlike the disclaimer in *Allegheny* – a sign proclaiming "A salute to liberty" – a reader must do more than glance at the Resolution; he or she must read the fine print. *See Allegheny,* 492 U.S. at 582, 109 S.Ct. 3086. And in reading this print, the viewer must first encounter statements "The Bible is true," and "The Bible is the word of life," before he or she comes to any sort of disclaimer of religious purpose. As the defendant recognizes, these statements, along with the other statements in preamble, have "religious meaning." (Rep. Br. at 13). We therefore find that to the extent a disclaimer could mitigate the endorsement inherent in displaying the Ten Commandments on the State Capitol grounds, the Commonwealth's current disclaimer is not only ineffective, but includes language expressly endorsing the Bible and Christianity.

Given that (1) the Commonwealth intends to display a document that is inherently religious, *see Stone,* 449 U.S. at 41, 101 S.Ct. 192; (2) the display will be on the grounds of the State Capitol; (3) the format of the monument emphasizes the Commandments' religious directives; (4) the Ten Commandments monument will be the largest monument in the display; (5) the intended "cultural and historical display" set forth in Section 8 lacks a readily discernible unifying theme, and; (6) the Resolution, which will be posted with the monument, tends to amplify the religious message, we hold that the defendant cannot

comply with Section 8 without impermissibly endorsing religion.

The ultimate effect of this endorsement is to send "the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist.,* 530 U.S. at 309-310, 120 S.Ct. 2266 (quoting *Lynch,* 465 U.S. at 688, 104 S.Ct. 1355 (O'Connor, J., concurring)).[5]

V.

We emphasize that in declaring Section 8 unconstitutional and permanently enjoining the defendant from complying with that statutory directive, we do not hold that the Commonwealth of Kentucky can never display the Ten Commandments or this monument in particular. To the contrary, we believe that the Supreme Court's opinion in *Stone* and Justice Stevens' statements in *Allegheny* not only acknowledge that the Ten Commandments may be constitutionally displayed, they provide considerable guidance how they can be displayed. The plaintiffs also recognize this fact in that they have not advocated a ban on the public display of the Ten Commandments or any such extreme remedy. Indeed, to their credit, they proposed a number of alternative displays in the district

[5] Because we find that Section 8 does not have a valid secular purpose and that it has the impermissible effect of endorsing religion, we do not reach the question of whether Section 8 unconstitutionally entangles the Commonwealth with religion.

court, including a historical display showcasing the various influences on our law by both secular and religious sources. While we cannot pass on the merits of plaintiffs' proposals, we are nevertheless confident that with careful planning and deliberation, and perhaps consultation with the plaintiffs, the Commonwealth can permissibly display the monument in question.

VI.

For the foregoing reasons, we affirm the district court's decision declaring Section 8 of the Kentucky Senate Resolution No. 57 unconstitutional under the Establishment Clause of the First Amendment and affirm its decision to permanently enjoin the defendant Commissioner of the Department for Facilities Management from complying with Section 8.

SARGUS, District Judge.

I concur in the opinion of Chief Judge Martin. I write separately to note that our decision is compelled by the Supreme Court's decision in *Stone v. Graham,* 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam) which found unconstitutional a Kentucky statute requiring the placement of the Ten Commandments in all public school classrooms. Further,

> [T]he Ten Commandments are not in peril. They may be displayed in every church, synagogue, temple, mosque, home and storefront. They may be displayed on lawns and in corporate board rooms. Where this precious gift cannot, and should not, be displayed as a *religious text* is on government property.

Harvey v. Cobb County, Ga., 811 F.Supp. 669, 670 (N.D.Ga.1993) (emphasis added), *aff'd* 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129, 114 S.Ct. 2138, 128 L.Ed.2d 867 (1994).

Finally, as the majority opinion makes clear, the Ten Commandments, which played a most significant role in the development of positive law and western civilization, may be displayed on public property in the context of their historical significance. Our Constitution does not permit, however, a state to select or favor one religious creed over another.

BATCHELDER, Circuit Judge, dissenting.

The majority today rules on the constitutionality of a historical and cultural display that is still being planned and has yet to be erected. Because the jurisdiction of the federal courts extends only to cases that are ripe for review, I respectfully dissent.

I.

Before this Court may address the plaintiffs' contention that Section 8 of Senate Joint Resolution No. 57 violates the Establishment Clause, we must be certain that we have jurisdiction – that is, we must determine whether the plaintiffs present an actual "case" or "controversy" within the meaning of Article III of the Constitution. We review this question of federal jurisdiction de novo. *Greater Detroit Res. Recovery Auth. v. United States EPA*, 916 F.2d 317, 319 (6th Cir.1990).

Of particular concern here is whether this case is ripe for review. "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is

unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties." *Bigelow v. Mich. Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir.1992) (quoting *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir.1990)). *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 630 & n. 1 (6th Cir.1992). "[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). Although neither party to this appeal raised the issue of ripeness, I will address it.

The ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir.1997). The Supreme Court has instructed that we are to make a two-fold inquiry: we must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S.

at 149, 87 S.Ct. 1507. A claim, to be ripe for review, must satisfy both criteria. *Nationwide Mut. Ins. Co. v. Cisneros,* 52 F.3d 1351, 1362 (6th Cir.1995). This circuit has interpreted the ripeness inquiry to include consideration of the likelihood that the harm complained of will actually occur; whether the record is sufficiently developed to make the case fit for judicial resolution; and hardship to the parties if relief is denied. *Magaw,* 132 F.3d at 284. As I shall explain, this case is not ripe.

The majority discusses a number of Supreme Court cases that provide guidance in determining whether a challenge to a religious display or figure erected on public property brought under the Establishment Clause is ripe for review. In *Stone v. Graham,* 449 U.S. at 39, 101 S.Ct. 192, the Supreme Court ruled that a Kentucky statute requiring the posting of the Ten Commandments in each public school classroom violated the Establishment Clause. While the Court, following *Lemon,* rejected the Commonwealth's proffered secular purpose as "self-serving" and "not sufficient to avoid conflict with the First Amendment," *id.* at 41, 101 S.Ct. 192 (citation omitted), it noted that this singular display of the Ten Commandments was entirely different from an integration of the Ten Commandments into the school curriculum, "where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42, 101 S.Ct. 192 (citing *Sch. Dist. of Abington Township v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)).

The Supreme Court used similar reasoning in *Lynch v. Donnelly,* 465 U.S. at 668, 104 S.Ct. 1355, where the Court upheld a town's Christmas display consisting of a creche

scene and a large variety of both religious and nonreligious items. *Id.* at 671, 104 S.Ct. 1355. Finding an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," the Court reviewed the country's history of governmental recognition of, and in fact, subsidizing of holidays having a religious significance, as well as the governmental acknowledgment of the country's religious heritage. *Id.* at 674-77, 104 S.Ct. 1355. The Court concluded that the constitutionality of the Christmas display must be determined by examining the display as a whole, and not by focusing inordinately on the creche scene, and viewed in that manner, the display did not offend the Establishment Clause. *Id.* at 680, 104 S.Ct. 1355. In a concurring opinion, Justice O'Connor concluded that the town did not "intend" either to endorse Christianity or express disapproval of non-Christian religions, but wanted only to celebrate a "public holiday through its traditional symbols." *Id.* at 691, 104 S.Ct. 1355 (O'Connor, J., concurring). Justice O'Connor analogized the nativity scene to a museum display of religious artifacts; the religious message is still communicated but there is no endorsement of the message by the museum. *Id.* at 692, 104 S.Ct. 1355.

A locality's holiday displays were again challenged in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). One display, which was held unconstitutional by the Court, was an unmistakably Christian nativity scene, while the other display, located outside another public building, consisted of a Christmas tree, a "Salute to Liberty" sign and a Chanukah menorah. *Id.* at 578, 109 S.Ct. 3086. As the majority discusses above, the Court found the county's nativity scene unconstitutional because there were no

offsetting nonreligious displays to detract from its religious message, *id.* at 598-602, 109 S.Ct. 3086, but found that the Chanukah menorah and Christmas tree, in conjunction with the "Salute to Liberty" sign, conveyed a secular "winter-holiday" message, in Justice Blackman's estimation. *Id.* at 616, 109 S.Ct. 3086 (Blackmun, J., opinion).

From *Lynch* and *County of Allegheny* we learn that public displays may, consistent with the Court's interpretation of the Establishment Clause, have a religious component and religious symbolism so long as the message from the display is neither completely religious nor exclusive of other religions. The unconstitutional display in *County of Allegheny* was entirely Christian, whereas the permissible displays in that case and in *Lynch* were more inclusive and less overtly religious. Applying that distinction, this circuit, in *Doe v. City of Clawson,* 915 F.2d 244 (6th Cir.1990), upheld a nativity scene based on a number of factors, one of which was the presence of other, nonreligious figures and messages. Besides the traditional Holy Family figures, there was a Santa Claus figure, a Noel sign, and a number of other holiday decorations conveying an overall message of celebrating the holiday, but not the religious nature of the holiday. *Id.* at 248-49. *See also Washegesic v. Bloomingdale Pub. Schs.,* 33 F.3d 679, 683 (6th Cir.1994), *cert. denied,* 514 U.S. 1095, 115 S.Ct. 1822, 131 L.Ed.2d 744 (1995) (citing *Stone* for the propositions that the constitutional infirmity of posting the Ten Commandments resulted from the fact that the display was not integrated with other displays or a course of study).

After reviewing these precedents, I conclude that this claim is not ripe for adjudication. At this point the plaintiffs' claim does not satisfy any of the factors set forth in

Magaw, 132 F.3d at 284, namely: a likelihood that the harm complained of will actually occur; that the record is sufficiently developed to make the case fit for judicial resolution; and that the parties will suffer hardship if relief is denied. First, because there is no evidence in the record to tell us what will comprise the "historical display" of which the Ten Commandments monument will be a part, I conclude that the plaintiffs have not demonstrated that the harm they complain of will ever come to pass, much less that the "injury in fact [is] certainly impending." *Magaw,* 132 F.3d at 280. And without this evidence, this Court lacks a factual basis upon which to make a determination of the display's constitutionality.

Second, Section 8 contains no description of the content of the "historical and cultural display" into which the monument is to be incorporated, and to date, no such display has been assembled. We are left to speculate about whether that display will be sufficiently historical and cultural to offset the religious tone of the monument or whether the display of the monument will be forbidden because of an explicitly religious message. The monument itself depicts the Ten Commandments as only one – albeit the most prominent one – of several messages, and in its implementation of Section 8, the Commonwealth might include in the display any number of other things relevant to the historical and cultural influences on the development of Kentucky law, which might well neutralize any message of endorsement of religion by the Commonwealth. The Magna Charta, the Declaration of Independence and the Constitution of United States come immediately to mind, not to mention Daniel Boone, long rifles and Indians. An historical display containing numerous nonreligious items would be akin to the display upheld in *Lynch,*

465 U.S. at 687, 104 S.Ct. 1355 (O'Connor, J., concurring), where the Court found that the nonexclusive nature of the display evidenced the city's desire to celebrate the holiday season.

Third, the plaintiffs have not shown that they would suffer any hardship now if relief is denied. They would not suffer any immediate economic harm, *Abbott Labs.,* 387 U.S. at 152-53, 87 S.Ct. 1507, nor would they suffer risk of prosecution by the state, *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298-99, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), nor would their constitutional speech or conduct be chilled, *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). Their worry that they might encounter a display in which the Ten Commandments monument is placed in such a way that it violates the Establishment Clause may be legitimate, but it is not legally cognizable at this point. *See, e.g., Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 734, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) ("[W]e do not find a strong reason why the [respondent] must bring its challenge now in order to get relief.").

The Supreme Court's recent decision in *Sante Fe Independent School District v. Doe,* 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), supports this conclusion. In *Sante Fe* the Court ruled unconstitutional a system in which the school allowed the student body, through balloting, to determine whether an invocation would be given at school football games and who would give the invocation should the student body elect to have one. *Id.* at 296-98, 120 S.Ct. 2266. Important for our purposes, the Court rejected the school district's argument that the case was not ripe because no prayer had actually yet been given. *Id.* at 313-16, 120 S.Ct. 2266. The Court found that the case

was ripe because an injury had occurred when the district enacted a policy which, on its face, revealed a purpose that itself violated the Establishment Clause. *Id.* at 313-17, 120 S.Ct. 2266. The clear evidence of this purpose, the Court held, was the policy's language using the religious term "invocation" with no secular alternatives, and the policy's decision-making mechanism permitting the Christian majority to impose its views on the non-Christian minority. *Id.* Here, no religious purpose is apparent on the face of Section 8 of Senate Joint Resolution No. 57 because, as this opinion has explained, Section 8 calls for the Ten Commandments monument to be *part* of an historical and cultural display. *See also Wheeler v. Barrera,* 417 U.S. 402, 426, 94 S.Ct. 2274, 41 L.Ed.2d 159 (1974) (ruling that an Establishment Clause challenge to Title I funds, where the plaintiffs claimed that Title I would allow publicly paid teachers to be sent to parochial schools to teach, was not ripe because the state had a choice of many constitutional means with which to implement Title I).

The plaintiffs argue that because portions of Senate Joint Resolution 57 – other than Section 8 – contain overtly Christian references, and because Section 8 requires the historical display to include the Resolution itself, the display will not be able to survive an Establishment Clause challenge. The plaintiffs' complaint, however, challenged only Section 8 of the Resolution, and in the absence of any specific evidence detailing the composition of the display mandated by Section 8, we can only speculate whether in its final form, that display will offend the Constitution. A case requiring this kind of speculation for its resolution is not ripe.

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107 F.Supp.2d 782

United States District Court,
E.D. Kentucky.

Rabbi Jonathan ADLAND, Reverend Johanna Bos, Reverend James Jerrell Greenlee, Jeff Vessels, and American Civil Liberties Union of Kentucky, Plaintiffs,

v.

Armond **RUSS**, In his Official Capacity as Commissioner of Dept. for Facilities Management, Defendant.

No. Civ.A. 00-51.

July 27, 2000.

David A. Friedman, Amer. Civil Liberties Union of Kentucky, Louisville, KY, Kathleen M. Flynn, Sales, Tillman & Wallbaum, Louisville, KY, C. Laurie Griffith, Griffith Law Offices, Louisville, KY, for Plaintiffs.

Barbara W. Jones, Frankfort, KY, *Karen A. Powell*, Frankfort, KY, Jennifer L. Cattico, Frankfort, KY, for Defendant.

MEMORANDUM OPINION AND ORDER

HOOD, District Judge.

On April 21, 2000, Governor Paul E. Patton signed into law Senate Joint Resolution Number 57. Section 8 of this Resolution requires that the Department of Facilities Management "relocate the monument inscribed with the Ten Commandments which was displayed on the Capitol grounds for nearly three decades to a permanent site on the Capitol grounds near Kentucky's floral clock to be made a part of a historical and cultural display which

shall include the display of this resolution in order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." Senate Joint Resolution No. 57 [Resolution], Section 8.

The plaintiffs seek to permanently enjoin the defendant from complying with the mandate of Section 8 of the Resolution. By agreement of the parties, the matter was heard on the merits, *see* Fed.R.Civ.P. 65(a)(2), on July 25, 2000. After hearing the arguments of counsel, the Court granted the plaintiffs the relief they sought, orally stating its preliminary findings of fact and conclusions of law. This Memorandum Opinion formalizes the same.

Factual Background

The Resolution itself contains a preamble consisting of seventeen "Whereas" clauses. The clauses recite the legislative purposes in enacting this Resolution. Two of the clauses involve Supreme Court decisions, and employ quotes which, when viewed in isolation, conclude that the Supreme Court has declared the United States to be a "Christian nation." Resolution, preamble. Ten of the clauses quote famous Americans professing their beliefs in the Bible, God, or Christianity. Four other clauses incorporate miscellaneous quotations regarding God or the Bible in pre-Revolutionary legislative sources or in Kentucky law. *See id.* The final clause implies that the text of the Ten Commandments appears in the U.S. Supreme Court chambers as part of a frieze which contains several depictions of historical law givers. *See id.*

The monument referred to in the Resolution, Section 8, is a stone marker that is over six feet tall and almost four feet wide. It was given to the Commonwealth in 1971

by the Fraternal Order of Eagles. In addition to the text of the Ten Commandments, the monument is inscribed with the Star of David, the Chi Rho, the "all-seeing eye" inside a pyramid, an eagle, and a flag. Contrary to the statement contained in the preamble to the Resolution, the monument was displayed on Capitol grounds for less than ten years or until 1980 when it was removed to make room for construction of a chiller plant. It has remained in storage since that time.

Section 8 of the Resolution directs that the monument be relocated to "Capitol grounds near Kentucky's floral clock." The floral clock area is a prominent and central feature on the Capitol grounds. The floral clock can be seen from the circular drive that leads up to the Capitol plaza and the public parking area. In fact, this position is such a focal point for the area that the State has chosen this location for a bronze plaque which welcomes visitors to the State Capitol. The plaintiffs argue that this dominant position indicates that the State favors and endorses monuments located there.

In addition to the centralized location, the floral clock located in this area attracts attention. The clock is thirty-four feet in diameter and weighs over 200,000 pounds. It is surrounded by seven other smaller memorials that emphasize the State's pride in the citizens, veterans, and public servants to whom said memorials are dedicated. If the "Ten Commandments Monument" were to be relocated to this area of the Capitol grounds, it would be the largest monument in the area, except for the floral clock. Both the floral clock and the "Ten Commandments Monument" would be visible to motorists driving on the road between the Capitol and the Capitol Annex.

Plaintiffs have filed this suit to enjoin the defendant, the Commissioner of the Department for Facilities Management of the Commonwealth, from relocating said monument to the Capitol grounds near the floral clock as directed by Section 8 of the Resolution, arguing that the provision is unconstitutional.

Issue of Standing

Defendant argues that Plaintiffs lack standing to bring this suit. The named plaintiffs include Rabbi Jonathon Adland, Reverend Johanna Bos, Reverend James Greenlee, Reverend Gilbert Schroerlucke, Jeff Vessels, and the American Civil Liberties Union of Kentucky (ACLU). All of the individually named plaintiffs have filed affidavits which indicate that they travel to the State Capitol frequently, and will endure direct and unwelcomed contact with the monument once it is relocated. The ACLU represents 1,800 members across the state who frequently travel to the Capitol and will also come in direct and unwanted contact with the monument if it is relocated near the floral clock.

Defendant argues that these Plaintiffs do not have standing as they will "not come into direct contact with the monument so as to be offended or form any other opinion regarding its message." Response at 13. The Sixth Circuit has held that anyone visiting a facility in which a religious object is unconstitutionally displayed, has standing to file suit as said person has suffered an actual injury. *See Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679, 683 (6th Cir.1994) (holding that a student who had graduated still had standing to sue his former school as he could

possibly return to site for social events). Thus, the plaintiffs have the requisite standing to pursue this action.

Constitutionality of Section 8 of The Resolution

The constitutionality of Section 8 is to be judged under the standards set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). In other words, the challenged section must "have a secular legislative purpose". *Id.* at 612, 91 S.Ct. 2105. In addition, "its principal or primary effect must be one that neither advances nor inhibits religion". *Id.* Finally, the Resolution "must not foster an excessive government entanglement with religion." *Id.* at 613, 91 S.Ct. 2105. All three prongs of the *Lemon* test must be satisfied if Section 8 is to pass constitutional muster.

Secular Legislative Purpose

The General Assembly directed the placement of the monument on Capitol grounds to "remind Kentuckians of the Biblical foundations of the law of this Commonwealth." Resolution, Section 8. My sister jurist, United States District Judge Jennifer Coffman, recently analyzed the possible existence of a secular purpose in the posting of the Ten Commandments.

In its original form, the Ten Commandments display,

> consisting only of the Commandments unaccompanied by any other documents, lacks any secular purpose. The Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and

> revealed word of God, and their very nature precludes a finding of a prevailing secular purpose here. Indeed, 'the pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature.'

American Civil Liberties Union v. Pulaski County, Kentucky, 96 F.Supp.2d 691, 698 (E.D.Ky.2000), quoting *Stone v. Graham,* 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).

This display is unaccompanied by any other historical documents evidencing the myriad of influences that shaped our current body of law. Therefore, Section 8 of the Resolution fails this prong of the *Lemon* test[1] as it does not contain a secular purpose.

Primary Effect Advances Christianity

The second prong of *Lemon* has undergone a metamorphosis since that decision was rendered in 1971. *See*

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[1] The Resolution requires that said same be included along with the display of the monument. The Resolution was to be part of the memorial in order to create an "historical and cultural display." Senate Joint Resolution No. 57, Section 8. However, the inclusion of the Resolution tends to create an exclusive display, rather than an "historical and cultural" perspective of the history of our laws. The entire preamble to the Resolution cites only Christian sources of law. By including the Resolution in the display, viewers will tend to leave with the impression that the Commonwealth of Kentucky endorses the opinion that Christianity is the central foundation of our law. The Resolution extolls the virtues of the Christian beliefs promulgated by the Bible. By including a copy of the Resolution along with the display of the monument, the legislation's religious intent is so clearly evident that the Resolution is unable to pass muster under the first prong of *Lemon.* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

generally Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971). In recent decisions, the Supreme Court has applied the "endorsement" test when testing the constitutionality of an action under the Establishment Clause. *Lynch v. Donnelly,* 465 U.S. 668, 681-83, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). The Sixth Circuit has found that "the endorsement test prohibits speech that a reasonable observer would think is an endorsement of religion by the government." *Granzeier v. Middleton,* 173 F.3d 568, 573 (6th Cir.1999). This test has been treated as a "refinement or clarification of the *Lemon* test." *Id.*

In the case at bar, a reasonable observer would interpret this display as the Commonwealth's endorsement of Christianity. Although the defendant cites case law which indicates that monuments such as the one in question meet the qualifications of this prong of the test, said cases are simply inapposite *sub judice*[2]. Many factors influence the conclusion that this display virtually endorses Christianity.

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[2] The cases cited by the defendant all involve monuments placed permanently in longstanding displays on governmental property. While the costs involved in removing those monuments were not considered in the cited opinions, this Court finds that the costs to be borne by the Commonwealth when relocating this monument impact the "entanglement" consideration under the *Lemon* test. *See infra section.*

In addition, most of the cases cited did not document the legislature's intent when the monument was originally placed. In *Colorado v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1024 (Co.1995), the court specifically notes that "the record contains no direct evidence of the State's purpose in accepting the monument . . . . [in fact] the State has no record of how the monument came to be in Lincoln Park." The case at bar is distinctly different. In fact, it is the very intent of the legislature that is most influential in the decision in this case.

First, the presentation of the monument containing the Ten Commandments, and the language of the Resolution detailing the various historical references to Christianity's influence on the Commonwealth leaves the viewer with a single impression: The Commonwealth of Kentucky believes that Christianity was the major motivating force behind the Commonwealth's current body of law.

This presentation shows Christianity's influence on the law to the exclusion of all other influences. The display anticipated in the Resolution would not make reference to the influences of the Magna Charta, English common law, or even the ancient Code of Hammurabi. These sources, as well as countless others, have served to mold our current system of law. However, the Resolution does not acknowledge any of these sources. Rather, it acknowledges the influence of Christianity to the exclusion of all else. No reasonable person could view this display without being left with the impression that the Commonwealth endorsed the idea that Christianity's influence on the law outranked all other historical influences.

This Resolution, created by the General Assembly and signed into law by the Governor, extolls the virtues of Biblical guidance. Although the Resolution may contain true and honest quotations of statements by famous Americans, the declaration that "[t]he General Assembly finds the Ten Commandments to be the precedent legal code of the Commonwealth . . .," endorses Christian influences to the exclusion of those from other religious and secular sources. Resolution, Section 7.

Second, the prominent placement of the monument would further support the reasonable person's conclusion that the Commonwealth endorsed Christian values. This

high traffic area is located near a famous Kentucky landmark. Even the defendant acknowledges that Kentucky's floral clock is "one of the world's largest." Response at 11. It is with great pride that the Commonwealth displays this clock on Capitol grounds, in the direct proximity of the bronze plaque that welcomes visitors to the State Capitol. The monument's placement would indicate that the Commonwealth approved of the display and the full panoply of its religious content.

Finally, the size of this monument further indicates the importance placed on the Biblical message contained in this display. While the floral clock is clearly larger and probably more eye catching than the monument in question, the monument would not be viewed as simply another object in a "monument garden." The facts clearly indicate that the sheer dimensions of this granite monolith would dwarf all the other memorials to deceased veterans and dedicated public servants in the vicinity.

A reasonable observer to viewing this display would only conclude that the Commonwealth endorsed the Biblical passage quoted on the monument, as well as the inspiring statements contained in the Resolution. The Court has considered the entirety of the presentation and concludes that the lack of historical context, location, and size of the monument create an impression that the Commonwealth endorses Christianity[3]. Therefore, Section

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[3] As the plaintiffs conceded during oral argument, many alternatives exist which might allow the state to place this monument on state property without violating the Constitution. The Court cannot speak to the merits of alternatives suggested by the plaintiffs, but the argument referenced a number of options, including:

(Continued on following page)

8 of the Resolution cannot meet the requirements of the second prong of the *Lemon* test.

Excessive Government Entanglement with Religion

In order to "assess entanglement, we have looked to the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Coles Ex. Rel. Coles v. Cleveland Board of Education,* 171 F.3d 369, 385 (6th Cir.1999) (internal citations omitted). The sum of all these elements can best be encapsulated in the notion that, "[i]ts display entangles the government with religion." *Washegesic,* 33 F.3d at 683.

The Commonwealth's mere "ownership and display" of the monument "endorses the Christian religion and promotes it exclusively." *Id.* at 684. The monument's presence at the focal point of the Capitol grounds, the accompanying Resolution that extols the benefits of Biblical guidance, and the implied endorsement of the

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– the creation of a free speech area on the Capitol grounds in which citizens would be able to express their differing views though a system of rotating exhibits, or a lottery structure;

– the display of the monument in a less prominent location, with the cost of upkeep and relocation paid out of private funds;

– the creation of an historical display that showcases the various influences on our law, including secular and religious sources.

Christian religion only begin the list of entanglements created by this Resolution.

The Commonwealth will bear certain costs in the relocation of this monument. First, the initial costs incurred by the Commonwealth in moving the monument from its current place in storage to the floral clock will be substantial. The monument is solid granite and is over six feet tall and almost four feet wide necessitating the construction of a substantial foundation before it is set in place. In addition, Defendant conceded during oral argument that a sidewalk will have to be specially constructed to allow for full viewing of the monument. The Commonwealth will also provide for the upkeep of the monument. These costs cannot be ignored. Thus, the Resolution fails to satisfy the third prong of the *Lemon* test.

Conclusion

Under the Establishment Clause, the Constitution mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The First Amendment was made binding upon the states by the Fourteenth Amendment. *See Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 757, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The Commonwealth cannot favor one religion without disfavoring another. One belief system cannot be supported and extolled without prejudicing another.

> To those who act or argue against this principle of equal liberty of conscience on grounds that their duty is to use the state in support of their particular beliefs, we answer that we cannot

> expect others to accept an inferior liberty. To those who say that the principle of equal liberty of conscience has the effect of rejecting the absolute nature of their religious beliefs, we reply that if any principle can be agreed to, it can only be that of an equal liberty of conscience for all.

Stein v. Plainwell Community Schools, 822 F.2d 1406, 1408 (6th Cir.1987).

To put it in other words, the function of our Constitution is to insure that the majority protects the views of the minority; the majority cannot by legislative fiat impose its views on the minority.

Accordingly,

IT IS ORDERED AND ADJUDGED herein as follows:

(1) That Senate Joint Resolution No. 57, Section 8, be, and the same hereby is, **DECLARED** to be **UNCONSTITUTIONAL;**

(2) That the defendant and his successors in office be, and they hereby are, **PERMANENTLY ENJOINED** from relocating the "Ten Commandments Monument" to the location on the Capitol grounds near the floral clock.

00-6139

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RABBI JONATHAN ADLAND, ET AL.,	)	
Plaintiff-Appellees,	)	
v.	)	ORDER
ARMOND RUSS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT FOR FACILITIES MANAGEMENT,	)	(Filed Nov. 22, 2002)
Defendant-Appellant.	)	

BEFORE: MARTIN, Chief Judge; BATCHELDER, Circuit Judge; and SARGUS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

* Hon. Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

[LOGO]

GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY

2000 REGULAR SESSION

SENATE JOINT RESOLUTION NO. 57
(AS ENACTED)

WEDNESDAY, MARCH 29, 2000

A JOINT RESOLUTION relating to the display of historic documents that include a depiction of the Ten Commandments.

WHEREAS, in the Preamble to Kentucky's Constitution, the Framers acknowledged Almighty God as the source of the people's liberty and invoked His blessings on the citizens of the Commonwealth:

> "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution"; and

WHEREAS, in 1992, the Kentucky General Assembly enacted KRS 158.195 to prevent the censorship or suppression of the official Acts of Congress or the writings and speeches of America's Founders and Presidents which contain references to God or the Bible; and

WHEREAS, the Ten Commandments appear over the bench where the United States Supreme Court Justices sit, thus showing the source from whence our laws and the governmental power of the state are derived; and

WHEREAS, America's colonial governments adopted the Ten Commandments not as an object of worship or an icon, but as the basis for their civil and criminal law, as illustrated on April 3, 1644, when the New Haven Colony Charter was adopted establishing that: "the judicial laws of God, as they were delivered by Moses be a rule to all the courts in this jurisdiction"; and

WHEREAS, when signing the Declaration of Independence on August 2, 1776, Samuel Adams, the "Father of the Revolution," emphasized its Biblical presuppositions:

> "We have this day restored the Sovereign to whom all men ought to be obedient. He reigns in heaven and from the rising to the setting of the sun, let His kingdom come"; and

WHEREAS, on August 20, 1789, Congressman Fisher Ames from Massachusetts proposed the wording of the First Amendment which was adopted by the House of Representatives in the first session of the Congress of the United States; and his writings clearly demonstrate that the Framers never intended the First Amendment to be so interpreted as to remove the Bible from public school classrooms:

> "We are spending less time in the classroom on the Bible which should be the principal text in our schools. . . ."; and

WHEREAS, in a letter dated August 18, 1790, President George Washington wrote to the Hebrew Congregation in Newport, Rhode Island, "All possess alike liberty of conscience and immunities of citizenship. . . . May the children of the stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other

inhabitants; while every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid"; and

WHEREAS, in his "Farewell Address" of September 19, 1796, President George Washington pointed out the connection between the faith of the Nation and its political prosperity when he declared:

> "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . . "; and

WHEREAS, acknowledging the Bible as an integral part of the fabric of our society, on September 11, 1777, the Continental Congress adopted a resolution to import 20,000 Bibles from Holland and Scotland, as the colonies were at war with England; and

WHEREAS, on May 29, 1845, the day before his death, President Andrew Jackson stated:

> "My lamp of life is nearly out, and the last glimmer has come. I am ready to depart when called. The Bible is true. The principles and statutes of that Holy Book have been the rule of my life, and I have tried to conform to its spirit as nearly as possible. Upon that sacred volume I rest my hope for eternal salvation, through the merits and blood of our blessed Lord and Saviour, Jesus Christ"; and

WHEREAS, President John Quincy Adams, the sixth President of the United States, wrote concerning the civil function of the Mosaic law:

> "The law given from Sinai was a civil and municipal as well as a moral and religious code;

> it contained many statutes . . . of universal application – laws essential to the existence of men in society and most of which have been enacted by every nation which ever professed any code of laws"; and

WHEREAS, in a June, 1778 letter to her son, John Quincy Adams, Abigail Adams reinforced noble values and a sense of ultimate accountability to God which she believed to be the foundation of true greatness:

> "Great learning and superior abilities, should you ever possess them, will be of little value and small estimation, unless virtue, honor, truth, and integrity are added to them. Adhere to those religious sentiments and principles which were early instilled into your mind, and remember that you are accountable to your Maker for all your words and actions"; and

WHEREAS, on February 29, 1892, the United States Supreme Court, in a unanimous decision which has never been overruled, cited sixty-six organic authorities which show the Bible's singular influence on America:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire group. These authorities were collected to support the historical conclusion that: 'no purpose of action against religion can be imputed any legislation, state or nation, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this

affirmation . . . we find everywhere a clear recognition of the same truth . . . this is a Christian nation'"; and

WHEREAS, on May 7, 1911, President Woodrow Wilson, addressing the Tercentenary Celebration of the Translation of the Bible into the English Language, stated:

"Moreover, the Bible does what is so invaluable in human life – it classifies moral values. It apprises us that men are not judged according to their wits, but according to their characters – that the last of every man's reputation is his truthfulness, his squaring his conduct with the standards that he knew to be the standards of purity and rectitude. How many a man we appraise, ladies and gentlemen, as great today whom we do not admire as noble! A man may have great power and small character"; and

WHEREAS, President Woodrow Wilson's letter to the soldiers and sailors of the United States during World War I, recorded in the Congressional Record, advised them:

"The Bible is the word of life. I beg that you will read it and find this out for yourselves – read not little snatches here and there, but long passages that will really be the road to the heart of it. You will find it full of real men and women not only, but also of things you have wondered about and been troubled about all your life, as men have been always; and the more you read, the more it will become plain to you what things are worthwhile and what are not, what things make men happy – loyalty, right dealings, speaking the truth, readiness to give everything for what they think their duty, and, most of all, the wish that they may have the real approval of the Christ, who gave everything for them – and the things

> that are guaranteed to make men unhappy – selfishness, cowardice, greed, and everything that is low and mean. When you have read the Bible, you will know that it is the Word of God, because you will have found it the key to your own heart, your own happiness, and your own duty"; and

WHEREAS, in his book, "Sources of Power," President Jimmy Carter acknowledged the importance of the Mosaic law as a foundation:

> "As we face changes and challenges, we need to hold on to the things that don't change, the foundations on which we can build our lives despite the uncertainty and danger of the future. God's law is the greatest of these foundations"; and

WHEREAS, in his February 22, 1990 proclamation designating 1990 as The International Year of Bible Reading, President George Bush declared:

"The Bible has had a critical impact upon the development of Western civilization. Western literature, art, and music are filled with images and ideas that can be traced to its pages. More important, our moral tradition has been shaped by the laws and teachings it contains. It was a biblical view of man – one affirming the dignity and worth of the human person, made in the image of our Creator – that inspired the principles upon which the United States is founded. President Jackson called the Bible 'the rock on which our Republic rests' because he knew that it shaped the Founding Fathers' concept of individual liberty and their vision of a free and just society. The Bible has not only influenced the development of our Nation's values and institutions, but also enriched the daily lives of millions of men and women who have looked to it for

comfort, hope, and guidance. On the American frontier, the Bible was often the only book a family owned. For those pioneers living far from any church or school, it served both as a source of religious instruction and as the primary text from which children learned to read. The historic speeches of Abraham Lincoln and Dr. Martin Luther King, Jr., provide compelling evidence of the role Scripture played in shaping the struggle against slavery and discrimination. Today the Bible continues to give courage and direction to those who seek truth and righteousness. In recognizing its enduring value, we recall the words of the prophet Isaiah, who declared, 'The grass withereth, the flower fadeth; but the word of our God shall stand forever.' Containing revelations of God's intervention in human history, the Bible offers moving testimony to His love for mankind. Treasuring the Bible as a source of knowledge and inspiration, President Abraham Lincoln called this Great Book 'the best gift God has given to man.' President Lincoln believed that the Bible not only reveals the infinite goodness of our Creator, but also reminds us of our worth as individuals and our responsibilities toward one another";

NOW, THEREFORE,

Be it resolved by the General Assembly of the Commonwealth of Kentucky:

Section 1. The Kentucky Department of Education, with assistance as necessary by the Legislative Research Commission, shall electronically transmit KRS 158.195 and this resolution to all public school teachers in the Commonwealth.

Section 2. Documents depicting the Ten Commandments may be posted in classrooms by any public school

teacher and on other public property, when incorporated into an historical display along with other historic documents as described in KRS 158.195. The purpose of the display shall not be to advance religion, but to advance the important secular purpose of illustrating how the Bible and the Ten Commandments have influenced the faith, morals, and character of American leaders who, in turn, have shaped American law, public policy, and institutions. For that reason, the General Assembly expresses no preference as to which version of the Ten Commandments is displayed or whether the display is in English, Hebrew, or a foreign language being taught in the classroom. To advance the secular purpose of making citizens of the Commonwealth more knowledgeable concerning the founding of America, the intent of the nation's Founders, and the formative influence of the Bible and the Ten Commandments on American leaders, institutions, and law, a copy of this resolution shall be made a prominent part of any historic display on public property which includes any depiction of the Ten Commandments.

Section 3. No fiscal court, city council, or school board shall mandate the posting of any historical displays set forth in KRS 158.195 which incorporate a depiction of the Ten Commandments until that governing body first sets forth by resolution or policy its secular purpose for erecting the historical display. This historical display shall not advance religion.

Section 4. Each historical display which incorporates a depiction of the Ten Commandments shall be accompanied by clearly legible copies of this resolution and of KRS 158.195; and the cost of posting and maintaining the displays may be paid for by voluntary private contributions.

Section 5. The Legislative Research Commission shall remit a sufficient number of copies of this resolution to the Department for Local Government for distribution by the department, in the manner it deems most efficient, to all elected officials of each city and county of the Commonwealth.

Section 6. The Legislative Research Commission shall remit a sufficient number of copies of this resolution to the Secretary of State for distribution by the Secretary of State, in the manner he deems most efficient, to the statewide elected officials of the Commonwealth.

Section 7. The General Assembly finds the Ten Commandments to be the precedent legal code of the Commonwealth which has provided the foundation for many of the civil and criminal statutes enacted into law throughout the history of the Commonwealth.

Section 8. The Department for Facilities Management shall relocate the monument inscribed with the Ten Commandments which was displayed on the Capitol grounds for nearly three decades to a permanent site on the Capitol grounds near Kentucky's floral clock to be made a part of a historical and cultural display which shall include the display of this resolution in order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth.

KRS § 158.195 READING AND POSTING IN PUBLIC SCHOOLS OF TEXAS AND DOCUMENTS ON AMERICAN HISTORY AND HERITAGE

Local boards may allow any teacher or administrator in a public school district of the Commonwealth to read or post in a public school building, classroom, or event any excerpts or portions of: the national motto; the national anthem; the pledge of allegiance; the preamble to the Kentucky Constitution; the Declaration of Independence; the Mayflower Compact; the writings, speeches, documents, and proclamations of the founding fathers and presidents of the United States; United States Supreme Court decisions; and acts of the United States Congress including the published text of the Congressional Record. There shall be no content-based censorship of American history or heritage in the Commonwealth based on religious references in these writings, documents, and records.

Supreme Court, U.S.
FILED
MAR 27 2003
OFFICE OF THE CLERK

No. 02-1241

In The

Supreme Court of the United States

ARMOND RUSS, in his official capacity as the Commissioner of the Kentucky Department for Facilities Management,

Petitioner,

v.

Rabbi JONATHAN ADLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming a permanent injunction preventing Kentucky officials from erecting on the State Capitol grounds a six-foot by four-foot monument dominated by the text of one version of the Ten Commandments?

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STATEMENT OF THE CASE

The State Capitol, located in Frankfort, is the seat of the Commonwealth of Kentucky's governmental power. It contains the State Senate, House of Representatives, Supreme Court and Governor's office. [Petitioner Appendix (Pet. App.) 25.] The focal point of the surrounding State Capitol grounds is the floral clock, "a prominent and central feature" that "attracts attention." [Pet. App. 45.] The floral clock "is thirty-four feet in diameter and weighs over 200,000 pounds." [Pet. App. 45.]

In 2000, the General Assembly enacted, and Governor Paul Patton signed, Senate Joint Resolution (SJR) 57, which compelled the placement of a Ten Commandments monument next to the floral clock. [*See* Pet. App. 2, 57-65.]

The Ten Commandments monument "is a stone marker that is over six feet tall and almost four feet wide."[1] [Pet. App. 44.] The Fraternal Order of Eagles gave it to the Commonwealth in 1971 and the Commonwealth displayed it until about 1980, when it removed the monument to make room for construction. [Pet. App. 3, 5.] The monument has remained in storage since then. [Pet. App. 5.][2]

---

[1] In addition to one version of the text of the Ten Commandments, the monument's border "is inscribed with the Star of David, the Chi Rho, the 'all-seeing eye' inside a pyramid, an eagle, and a flag." [Pet. App. 5.]

[2] SJR 57 thus is wrong when it says that the monument "was displayed on the Capitol grounds for nearly three decades. . . . " [Pet. App. 5; *see* Pet. App. 65.]

SJR 57 recites its legislative purposes in seventeen "Whereas" clauses. [Pet. App. 57-63.] Two clauses effectively "conclude that the Supreme Court has declared the United States to be a 'Christian nation.'" Ten other clauses "quote famous Americans professing their beliefs in the Bible, God, or Christianity." Four others "incorporate miscellaneous quotations regarding God or the Bible in pre-Revolutionary legislative sources or in Kentucky law." The final clause "implies that the text of the Ten Commandments appears in the U.S. Supreme Court chambers as part of a frieze which contains several depictions of historical law givers." [Pet. App. 44.]

SJR 57 requires that the monument be placed on the Capitol grounds near the floral clock. [Pet. App. 2.] The district court – whose chambers are within a mile of that site – summarized the significance of the location as follows:

> The floral clock area is a prominent and central feature on the Capitol grounds. The floral clock can be seen from the circular drive that leads up to the Capitol plaza and the public parking area. In fact, this position is such a focal point for the area that the State has chosen this location for a bronze plaque, which welcomes visitors to the State Capitol. . . .
>
> In addition to the centralized location, the floral clock located in this area attracts attention. The clock is thirty-four feet in diameter and weighs over 200,000 pounds. It is surrounded by seven other smaller memorials that emphasize the State's pride in the citizens, veterans, and public servants to whom said memorials are dedicated. If the "Ten Commandments Monument" were to be relocated to this area of the

> Capitol grounds, it would be the largest monument in the area, except for the floral clock. Both the floral clock and the "Ten Commandments Monument" would be visible to motorists driving on the road between the Capitol and the Capitol Annex.

[Pet. App. 45.][3]

In July 2000, the American Civil Liberties Union and five individuals, including a rabbi and three ministers, filed suit in the United States District Court for the Eastern District of Kentucky. They alleged that SJR 57, which compelled the placement of the Ten Commandments monument at a central location on the Capitol grounds, violated the First Amendment's establishment clause. The district court consolidated its hearing on the preliminary injunction motion with trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). On July 27, 2000, the district court issued its memorandum opinion, order and judgment declaring SJR 57 unconstitutional and permanently enjoining Armond Russ, Commissioner of the Department for Facilities Management, from erecting the Ten Commandments monument. [Pet. App. 43-54.]

A divided panel of the Sixth Circuit affirmed. [Pet. App. 1-42.] The majority found that the articulated purposes for SJR 57 were not secular, did not justify placing the Ten Commandments – a sacred and religious text for

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[3] By contrast, the other memorial plaques are placed parallel to ground level or on a small pedestal. They are tiny compared to the Ten Commandments monument: "[T]he sheer dimensions of this granite monolith would dwarf all the other memorials to deceased veterans and dedicated public servants in the vicinity." [Pet. App. 51.]

Jews and Christians – at the focal point of the State Capitol grounds, and thus violated the first prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). [Pet. App. 13-21.] The majority also held that placement of the Ten Commandments monument would violate the endorsement test under *Lemon*'s second prong, because a reasonable observer would deem the monument, in context, as an endorsement of religion. [Pet. App. 22-33.] Judge Batchelder dissented on ripeness grounds. [Pet. App. 35-42.]

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First there is no conflict among the circuits. The Sixth Circuit's opinion is consistent with two decisions from the Seventh Circuit, *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002), and *Books v. City of Elkhart, Indiana*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2002). No federal court of appeals has issued a conflicting decision since this Court denied review from the two Seventh Circuit cases. The petitioner does not argue otherwise.

Second, the Sixth Circuit correctly applied settled establishment clause law in finding that the legislature's articulated purposes for enacting SJR 57 are not secular and that the effect of placing a six-foot by four-foot Ten Commandments monument at the focal point of the State Capitol grounds is to impermissibly endorse religion. The petitioner merely seeks to correct what he perceives to be an incorrect application of well-settled principles of law.

Third, the petitioner's claim that this case was not ripe for decision ignores the factual record (and petitioner's own

argument) in the courts below. That record detailed the precise content and physical context of the Ten Commandments display, which petitioner argued was constitutional. Again, the petitioner merely seeks to correct what he perceives to be a premature application of well-settled principles of law.

ARGUMENT

I. There Is No Significant Conflict In The Federal Appeals Courts.

This Court has considered the constitutionality of government Ten Commandments displays only once. In *Stone v. Graham*, 449 U.S. 39 (1980), the Court summarily struck down a Kentucky statute requiring each public school to post the Ten Commandments on classroom walls. Although each display was to include a disclaimer that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," *id.* at 41, the Court held that the statute lacked a secular legislative purpose because:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. The Commandments do not confine themselves to arguably secular matters. . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Id., 449 U.S. at 41-42 (footnote and citations omitted); *see id.*, 449 U.S. at 42 (referring to the Ten Commandments as a "religious text[ ]").

The courts of appeals have consistently shared and applied this understanding of *Stone*. Here, the Sixth Circuit deemed Kentucky's articulated "secular purpose" but a variation on the *Stone* theme. Because Kentucky's purpose, as reflected in SJR 57's text, is conceptually identical to Ky. Rev. Stat. § 158.178(2)'s purpose, *Stone* conclusively established that the asserted secular purpose "cannot blind" the courts to the obvious sacred nature of the legislative command. "The pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature." *Stone*, 449 U.S. at 41.

In *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002), the Seventh Circuit applied *Stone* to find that Indiana lacked a valid secular purpose for maintaining a Ten Commandments monument at the Indiana Statehouse. *See id.*, 259 F.3d at 770-71 ("the Ten Commandments is a religious and sacred text that transcends secular ethical or moral concerns"). And in *Books v. City of Elkhart, Ind.*, 235 F.3d 292 (7th Cir.), *cert. denied*, 532 U.S. 1058 (2002), the Seventh Circuit applied *Stone* to enjoin a city's similar Ten Commandments display. *Id.*, 235 F.3d at 302 (the Ten Commandments cannot "be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document").

No court of appeals case since *Stone* has conflicted with the Sixth and Seventh Circuits' application of that decision.[4] No other circuit has issued a Ten Commandments decision since this Court denied review in *O'Bannon* and *Books*. And the petitioner does not argue that any conflict in application warrants this Court's review.

II. The Sixth Circuit Correctly Applied This Court's Cases To Hold That SJR 57 Lacks A Valid Secular Purpose And Has The Impermissible Effect Of Endorsing Religion.

A. Kentucky Seeks Plenary Review Merely To Challenge The Sixth Circuit's Application Of Established Law To Particular Facts.

A Ten Commandments display's constitutionality under the establishment clause must be gauged by the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To survive scrutiny under *Lemon*, publicly displayed religious text must have a valid secular purpose and must not foster nor discourage religion or religious

[4] Seven years before *Stone*, the Tenth Circuit held that the Ten Commandments are not primarily religious in nature. *See Anderson v. Salt Lake City*, 475 F.2d 29, 34 (10th Cir. 1973). That court has since questioned *Anderson*'s continued vitality. *See Summum v. Callaghan*, 130 F.3d 906, 910 n.2 (10th Cir. 1997) ("Since *Anderson* was decided, however, more recent cases, including a Supreme Court case, cast doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature"); *id.*, 130 F.3d at 912 n.8 ("our decision in *Anderson* has been called into question by the Supreme Court in *Stone*") (citations omitted).

beliefs.[5] *Id.* Governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), a majority of this Court adopted the endorsement analysis contained in Justice O'Connor's *Lynch* concurrence. That analysis modified *Lemon*'s "effects" prong to ask "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (Justice O'Connor, concurring); *County of Allegheny*, 492 U.S. at 562. *See also Sante Fe Independent School District v. Doe*, 530 U.S. 290, 307 (2000) (focusing on "[t]he actual or perceived endorsement of the message"). In determining whether an endorsement exists, courts must focus on the precise factual context because, for example, "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 690 (Justice O'Connor, concurring). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement. . . . " *Lynch*, 465 U.S. at 694 (Justice O'Connor, concurring). Thus,

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[5] *Lemon* contains a third prong, asking whether the challenged display fosters excessive entanglement. In *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality opinion), the plurality noted that to some extent *Lemon*'s "excessive entanglement" prong had been absorbed into the "primary effect" prong. This refining of *Lemon* is not relevant here because the respondents have never claimed that the challenged Ten Commandments monument creates an "excessive entanglement."

whenever courts determine whether a specific governmental practice, in context, violates the establishment clause, "the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678.

The Sixth Circuit properly recognized that these principles governed the establishment clause analysis by which SJR 57 must be gauged. [Pet. App. 11-13.] Kentucky objects merely because, in its estimation, the Court of Appeals applied this settled law wrongly or too soon. Given the express purposes of the resolution, and given that the Ten Commandments monument would be the only element added to an already-existing context, the Sixth Circuit's application of settled law to unique facts is not grounds for plenary review. And, in any event, the Court of Appeals applied the law correctly.

B. The Sixth Circuit Correctly Found That SJR 57 Lacked A Valid Secular Purpose And That The Ten Commandments Monument, In Context, Endorsed Religious Belief.

1. The Sixth Circuit Properly Found That The Resolution Lacked A Valid Secular Purpose.

Where "a governmental intention to promote religion is clear," *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), this Court has not hesitated to hold the challenged conduct unconstitutional. Thus, the Court has invalidated Louisiana's creationism statute, *Aguillard*; struck down a Kentucky law requiring the posting of the Ten Commandments in public schools, *Stone*; struck down Alabama's moment of silence statute, *Wallace v. Jaffree*, 472 U.S. 38 (1985); and held unconstitutional the mandated daily reading of Bible verses and the Lord's Prayer in

public schools. *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). Significantly, in each of those cases, this Court held that the challenged conduct was motivated by a religious purpose, and disregarded the government's assertion of a sincere nonreligious purpose.

Nor is the requirement of a secular purpose "satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (Justice O'Connor, concurring). While a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75) (brackets supplied in *Santa Fe Indep. Sch. Dist.*).

The appeals court correctly concluded that the resolution's stated purpose is not secular. At its core, SJR 57 demands that the Ten Commandments monument be erected "to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." [Pet. App. 65.] But that purpose is not secular, for this Court rejected Kentucky's similar assertion twenty years ago.

In *Stone*, 449 U.S. 39, this Court summarily struck down a Kentucky statute requiring schools to post copies of the Ten Commandments. Kentucky's statute required that each Ten Commandments display include the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41. This Court was unpersuaded: "The Ten Commandments are

undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted). SJR 57 is but a variation on that theme.

Because SJR 57's "Biblical foundations of the laws of the Commonwealth" is conceptually identical to Ky. Rev. Stat. § 158.178(2)'s "fundamental legal code of Western Civilization and the Common Law," *Stone* conclusively establishes that the resolution's asserted secular purpose "cannot blind" this Court to the obvious sacred nature of the legislative command. "The pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature." *Stone*, 449 U.S. at 41.

This articulated legislative purpose is no more secular than that struck down in *Stone*; to the contrary, as the district court noted, the legislature's purpose of "re-mind[ing] Kentuckians of the Biblical foundations of the law of this Commonwealth" is not validly secular because the "display is unaccompanied by any other historical documents evidencing the myriad of influences that shaped our current body of law." [Pet. App. 48.][6]

Moreover, the resolution's preamble dispels any notion of secular purpose. SJR 57 does eight things, one of which – compulsory monument display – is at issue here.[7]

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[6] Perhaps recognizing that *Stone* dooms any "secular purpose" argument, the Commonwealth makes no effort to address this point. Instead, the Commonwealth argues only that the case was not ripe for decision.

[7] The resolution also "finds" the Ten Commandments to be "the precedent legal code of the Commonwealth," requires the resolution's

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And it explains why it does those things – that is, it recites legislative purpose – in the preamble, consisting of seventeen "Whereas" clauses. Two of the seventeen clauses reciting legislative purpose involve Supreme Court decisions. One criticizes modern establishment clause jurisprudence, asserting that "the Framers never intended the First Amendment to be so interpreted as to remove the Bible from public school classrooms." [Pet. App. 58 (citing writings of Congressman Fisher Ames).] The other mistakenly implies that in 1892 this "Court, in a unanimous decision which has never been overruled," declared this to be a "Christian nation." [Pet. App. 60 (alluding to *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892))].[8] Ten others recite famous Americans' veneration for the Bible, God or Christianity.[9] Four allude to the miscellaneous mention of God or the Bible in Kentucky law or pre-Revolutionary legislative matters. The last recites the Ten Commandments' appearance in the Supreme Court.[10] As the district court noted,

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posting along with the monument, requires distribution of the resolution and other materials and permits the posting of the Ten Commandments in classrooms and other public buildings. [Pet. App. 63-65.]

[8] *Church of the Holy Trinity* was not a First Amendment case, but an immigration case. In the course of deciding a question of statutory construction, this Court said in dictum that this is a Christian nation.

[9] SJR 57 cites statements or writings by Samuel Adams, George Washington, Andrew Jackson, John Quincy Adams, Abigail Adams, Woodrow Wilson, Jimmy Carter and George Bush.

[10] SJR 57 implies that the text of the Ten Commandments appears in the courtroom, rather than that the frieze contains several depictions of historical "law givers," including one showing Moses carrying two tablets.

> the Resolution tends to create an exclusive display, rather than an "historical and cultural" perspective of the history of our laws. The entire preamble to the Resolution cites only Christian sources of law. By including the Resolution in the display, viewers will tend to leave with the impression that the Commonwealth of Kentucky endorses the opinion that Christianity is the central foundation of our law. The Resolution extols the virtues of the Christian beliefs promulgated by the Bible. By including a copy of the Resolution along with the display of the monument, the legislation's religious intent is . . . clearly evident. . . .

[Pet. App. 48 n.1.]

Finally, courts "not only can, but must, include an examination of the circumstances surrounding [the legislative] enactment." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318. Here, those circumstances reveal the innately sectarian backdrop to SJR 57's enactment. In 1999, local governments throughout Kentucky posted the Ten Commandments in courthouses, schools and other public buildings. These local governments invited legal challenges and three received them amid wide publicity. *See ACLU of Kentucky v. McCreary County*, 96 F.Supp.2d 679 (E.D. Ky. 2000) (preliminarily enjoining Ten Commandments display in county courthouse); *ACLU of Kentucky v. Pulaski County*, 96 F.Supp.2d 691 (E.D. Ky. 2000) (same); *Doe v. Musselman*, 96 F.Supp.2d 667 (E.D. Ky. 2000) (preliminarily enjoining Ten Commandments display in public schools).

While those cases were pending, the state legislature convened. "Ten Commandments" legislation was high on the legislative agenda, generating several bills and widespread public debate and commentary. Ultimately, the

legislature enacted SJR 57, with its direct challenge to modern establishment clause jurisprudence and candid embrace of 100-year-old sectarian dictum. Under these well-publicized circumstances, the Commonwealth "nevertheles[s] ask[ed the courts] to pretend that [it] d[id] not recognize what every [Kentuckian] underst[ood] clearly – that this [resolution was] about prayer." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318.

For each of these reasons, then, SJR 57 lacks a valid secular purpose. The resolution's articulated purpose is plainly religious. The Commonwealth's "precedent legal code" assertion has already been rejected by this Court as religious. And the context in which SJR 57 was enacted only highlights the legislature's religious purposes. SJR 57 therefore violates *Lemon*'s purpose prong and the Sixth Circuit was correct in so holding.

2. The Sixth Circuit Properly Found That, By Mandating Erection Of The Ten Commandments Monument Near The Floral Clock, SJR 57's Primary Effect Was To Endorse Religion.

Lemon also requires that a publicly displayed religious symbol have a primary effect that neither fosters nor discourages religion. *Lemon*, 403 U.S. at 612-13. This second or "endorsement" prong requires scrutiny of the display's environment or context, for the establishment clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593. Endorsement of religion is impermissible because it gives a "message to nonadherents that they are outsiders, not full members of the political community,

and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (Justice O'Connor, concurring).

At issue here, then, is whether SJR 57's compelled display of the Ten Commandments similarly and impermissibly endorses religion. For the following reasons, the Sixth Circuit correctly found that it does.

To begin with, the Ten Commandments are of a completely different ilk than memorial plaques, a floral clock, or a "Welcome to Kentucky" sign. They do not commemorate important Kentuckians. They do not celebrate Kentucky's political heritage.[11] The Commandments

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[11] To be sure, Kentucky's historical and political leaders, like the nation's Framers, undoubtedly read and knew of the Ten Commandments. But, as historians have noted, those who created the Constitution and Bill of Rights studiously avoided any religious references:

> God and Christianity are nowhere to be found in the American Constitution, a reality that infuriated many at the time. The U.S. Constitution, drafted in 1787 and ratified in 1788, is a godless document. Its utter neglect of religion was no oversight; it was apparent to all. Self-consciously designed to be an instrument with which to structure the secular politics of individual interest and happiness, the Constitution was bitterly attacked for its failure to mention God or Christianity. Our history books usually describe in great detail the major arguments made against the federal Constitution by its Anti-Federalist opponents; it meant death to the states and introduced an elitist Senate and a monarchical presidency. They seldom mention, however, the concerted campaign to discredit the Constitution as irreligious, which for many of it opponents was its principal flaw.... [T]his underremembered controversy of 1787-88 over the godless Constitution was one of the most important public debates ever held in America over the place of religion in

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derive from the Old Testament, Exodus 20:2-17 and Deuteronomy 5:6-21. Jewish tradition teaches that the Ten Commandments were given by God to Moses on Mt. Sinai (about 3200 years ago). For this reason, many Christians and Jews deem the Ten Commandments sacred.[12] Although the Ten Commandments can be divided into groupings that concern God and those that do not, believers see the Ten Commandments as a unitary document, given to humans by their deity, and held together by their initial pronouncement that "I am the Lord thy God."

The Ten Commandments undoubtedly represent an important code of human conduct and behavior, but they are hardly unique. The Code of Hammurabi, the earliest compilation of Babylonian law (*circa* 2200 B.C.E.), predated Mosaic law by 1000 years. THE HAMMURABI CODE (trans. Chilperic Edwards) (1904), p. 120. Indeed, the Ten Commandments were derived from the Code of Hammurabi and two dozen passages in Exodus are substantially identical to sections in the Code of Hammurabi. *Id.* at 123-30. Like the Ten Commandments, the Code of Hammurabi prohibited killing, adultery, stealing, and

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politics. The advocates of a secular state won, and it is their Constitution we revere today.

Isaac Kramnick And R. Laurence Moore, The Godless Constitution – The Case Against Religious Correctness 27-28 (1996).

[12] There are at least three versions of the Ten Commandments in use by Jews, Catholics and Protestants. Among other differences, the Jewish version prohibits "murder" as opposed to "killing." The Protestant version bans the making of graven images, a provision absent from the Catholic version. *See generally*, Steven Lubet, *The Ten Commandments in Alabama*, Constitutional Commentary, pp. 471, 475 (Winter 1988).

bearing false witness. *Id.* at 3, 6, 8, 21-22, 129, 153, 206-07, 209-10, 259-60.

Other ancient codes similarly prohibited such things as murder, theft, adultery and perjury. *See* The Hittite Laws (E. Neufeld trans.) (1951) [Cuneiform fragments of Hittite laws written *circa* 1370 B.C.E. prohibit homicide, theft and adultery]; Albert Kocourek & John H. Wigmore, Source Of Ancient And Primitive Law 469-99 (1915) [the Laws of Manu (Hindu), created *circa* 1100 B.C.E., prohibited murder, adultery, theft and perjury]; Ilias Arnaoutoglou, Ancient Greek Laws: A Sourcebook 22-23, 70-73 (1998) [Athenian law of the 6th Century B.C.E. prohibited adultery, theft, murder and other forms of homicide]; 1 The Civil Law 57-77 (S.P. Scot trans.) (1932), 11 The Civil Law 29-46 [Roman law prohibited murder, theft, perjury and adultery]; A.F.P. Hails, Remnants Of Ch'in Law 120-131, 138-40, 146-49, 168-69 (1985) [Ch'in Dynasty, *circa* 7th Century B.C.E., prohibited theft, falsely denouncing someone as a criminal, killing without authorization and adultery]. Nor is it surprising that many moral codes, including those predating the Ten Commandments, contain similar secular rules, for without basic prohibitions on murder and stealing life would be "nasty, brutish, and short." Thomas Hobbes, Leviathan 107 (Herbert W. Schneider, ed., Bobbs Merrill 1958) (originally published in 1651).[13]

[13] Nor can the Ten Commandments be described as a unique foundational document for American law in general. American law is based on English law, which derives from Roman, Anglo-Saxon, and Norman law, which in large part ignored Mosaic law as applying only to Jews. *See* Lawrence Friedman, A History Of American Law 15 (1973);

(Continued on following page)

Because the Ten Commandments are a recognized code of human conduct, the Commonwealth might elect to include them in an appropriate educational display on moral codes. *See Stone*, 449 U.S. at 42 (noting, in striking down required posting of Ten Commandments in Kentucky schools, that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. . . . ") In such a display of various behavioral codes throughout history, a reasonable observer likely would not deduce that the government endorsed the Ten Commandments over other moral codes. Indeed, Justice Stevens, concurring in *Allegheny*, noted as much:

> For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great

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Bernard J. Mislin, Jewish Law In American Tribunals 1, 25-28 (1976); Max Radin, Handbook Of Anglo-American Legal History 1-5 (1936).

> proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring) (footnote and internal citations omitted).

SJR 57's Ten Commandments display is not a display of "lawgivers." Nor does it purport to represent a sampling of great moral codes. The Ten Commandments monument would contain the only religious text and the only moral code displayed on the capitol grounds. Nor would the display expose Kentuckians to the teachings of the world's great cultures and religions, for only one version of the Ten Commandments is displayed. The Ten Commandments are religious, first and foremost. They are sacred to those who worship them as the word of God. And displaying the Ten Commandments within proximity of memorial plaques does not make the Ten Commandments like them.

Nor is the monument's inherent religious nature diminished by its physical context. The presence of the Star of David, a flag, an eagle and the "all-seeing" eye do not neutralize the religious effect of the Ten Commandments monument. As for the Star of David, simultaneous endorsement of two religions "is no less constitutionally infirm than the endorsement of Christianity alone." *Allegheny*, 492 U.S. at 615. The flag, eagle and "all-seeing" eye are small in comparison to the Commandments' text. In addition, the three figures are incorporated into the monument's decorative border obscuring them further. The reasonable person viewing the Ten Commandments monument does not see a collection of texts and figures, but a six-foot by four-foot stone tablet, erected on the

Capital grounds, proclaiming "I AM the LORD thy God." (Emphasis in original.) The effect of such a display is clearly religious.[14]

The proposed location of the Ten Commandments monument ensures that the effect of the display will be to endorse religion. The monument is to be placed in what the Commonwealth characterized below as a "monument garden" near Kentucky's floral clock. But the Ten Commandments monument would dwarf all other flowers in the garden. [Pet. App. 51.] The monument is four feet across and more than six feet high. The seven "historical" markers in the floral clock area are relatively small, flat bronze rectangles set in the ground or on small pedestals. Only the floral clock even remotely approaches the Ten Commandments monument's size. Thus, the Ten Commandments monument, with its dominant size and imposing text, will be the focal point of the display, as the district court expressly found:

> [T]he prominent placement of the monument would further support the reasonable person's conclusion that the Commonwealth endorsed Christian values. This high traffic area is located near a famous Kentucky landmark. . . . It is with

[14] SJR 57 also requires that the resolution's text be displayed along with the monument. [Pet. App. 65.] But rather than distancing the Commonwealth from the blatantly religious message of the Ten Commandments, the resolution reinforces the overwhelmingly Christian theme of the display. The resolution proclaims Biblical scripture as the cornerstone of American jurisprudence, quotes American political leaders praising the Bible and generally lauds the role of religion in American life. The resolution thus highlights the impression that the Commonwealth "endorses Christian influences to the exclusion of those from other religious and secular sources." [Pet. App. 48.]

> great pride that the Commonwealth displays this clock on Capitol grounds, in the direct proximity of the bronze plaque that welcomes visitors to the State Capitol. The monument's placement would indicate that the Commonwealth approved of the display and the full panoply of its religious content.
>
> [T]he size of this monument further indicates the importance placed on the Biblical message contained in this display. While the floral clock is clearly larger and probably more eye catching than the monument in question, the monument would not be viewed as simply another object in a "monument garden." The facts clearly indicate that the sheer dimensions of this granite monolith would dwarf all the other memorials to deceased veterans and dedicated public servants in the vicinity.

[Pet. App. 50-51.] The sum effect of this display is an unconstitutional endorsement of religion.

Nor does SJR 57 place the Ten Commandments far from the seat of power. Indeed, rather than incorporating the monument into a pre-existing monument garden elsewhere in the Commonwealth, the General Assembly deliberately chose to place the Ten Commandments within 100 yards of the seat of all three branches of Kentucky state government. The proximity of the Capitol to the proposed monument leaves little doubt that the

Commonwealth endorses, approves and condones a display of purely religious text on its property.[15]

The American historical experience recognizes many religious faiths and personal philosophies. By contrast, SJR 57's mandated display of the Ten Commandments endorses one religious belief system. This contravenes what this Court has noted is our real heritage:

> This nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. . . .
>
> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . "

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[15] The Commonwealth now appears to have abandoned all efforts to argue that the Ten Commandments display would not endorse religion. Instead, picking up on a suggestion made for the first time by the dissenting judge below during rebuttal argument, the Commonwealth suggests that the case is not ripe because one must speculate about the other components of the Ten Commandments display. But this ignores the record below and the Commonwealth's consistent position before the district and circuit courts. The record reflects that SJR 57 mandated *adding* the Ten Commandments monument (and the Resolution's text) to an already-existing "monument garden" – to wit, the existing State Capitol grounds. Thus, the courts below had no need to speculate about context; the record described in detail the existing grounds and the precise physical location of the Ten Commandments display. The context thus was fully described in the record and the issue was "fit[ ] . . . for judicial decision." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

> Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."

County of Allegheny, 492 U.S. 573, 590 (1989) (quoting *Wallace*, 472 U.S. at 52). The legislature's mandate that Kentucky erect a Ten Commandments monument flies in the face of this diversity and our national heritage. The appeals court correctly found it to be unconstitutional.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the context-based inquiry demanded by this Court. There is no meaningful conflict with decisions of another circuit court. And because the record detailed the precise location and elements of the Commonwealth's Ten Commandments display, the case was ripe for decision. Because there are no grounds for granting plenary review, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 27 2003
CLERK

(3)

No. 02-1241

In the Supreme Court of the United States

ARMOND RUSS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE KENTUCKY DEPARTMENT FOR FACILITIES MANAGEMENT,
Petitioner,

v.

RABBI JONATHAN ADLAND, ET AL.,
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, INDIANA, MISSISSIPPI, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause prohibits government from displaying the Ten Commandments, in a context replete with secular and historical monuments, to acknowledge the Commandments' historical role in American culture and law.

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No. 02-1241

In the Supreme Court of the United States

ARMOND RUSS, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE KENTUCKY DEPARTMENT FOR FACILITIES MANAGEMENT,
Petitioner,

v.

RABBI JONATHAN ADLAND, ET AL.,
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, INDIANA, MISSISSIPPI, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI

Over time, Texas and many other States have chosen to erect monuments displaying the Ten Commandments as foundational to the development of our system of laws. The recognition of the importance of the Ten Commandments to the development of the rule of law and to the availability of equal justice under law is widespread, by the federal government, the state governments, local governments, and by the people.

In recent years, these state and local monuments have been subjected to consistent and frequent legal attack in an effort to

remove them and to prevent any future construction. The result of this campaign is that States now face conflicting federal-and state-court decisions on whether and when such monuments are constitutional, and, more broadly, on just how far governments may go in acknowledging religion as a part of our national heritage through displays on public property that include both religious and nonreligious symbols.

Through this case, the Court has the opportunity to provide state and local government officials much-needed guidance and clarification in this specific area of the law as well as in the wider context of Establishment Clause jurisprudence.

SUMMARY OF THE ARGUMENT

For many decades, States and local governments have chosen to acknowledge and memorialize the historical and cultural contributions of the Ten Commandments to the development of western legal codes. Today, there is a significant and growing split of authority among the courts of appeals and state courts regarding the constitutionality of these government displays of the Ten Commandments. Not only have those courts come to opposite constitutional conclusions regarding *virtually identical displays*, but they have also differed starkly in their analysis of almost every aspect of the test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The importance of this issue is amply demonstrated by widespread decisions of States, local governments, and even the federal government to display the Ten Commandments, and by the corresponding determination of opponents of such displays to bring litigation to stop them. This Court should grant certiorari to resolve the growing conflict among the lower courts and to reaffirm that government may legitimately recognize the role of religion as a foundational aspect of our nation's law and culture.

ARGUMENT

I. THE PERMISSIBILITY OF GOVERNMENT DISPLAYS OF THE TEN COMMANDMENTS RAISES A QUESTION OF NATIONAL IMPORTANCE.

Hundreds of Ten Commandment monuments are displayed on government property across the country. *See Books v. City of Elkhart*, 235 F.3d 292, 294-95 (CA7 2000) (noting that local chapters of the Fraternal Order of Eagles donated Ten Commandments monuments to States and political subdivisions across the country), *cert. denied*, 121 S.Ct. 2209 (2001). And the government interest in displaying the Ten Commandments only continues to grow. At least five States have enacted laws authorizing the display of the Ten Commandments on public grounds or in public schools. *See* Ind. Code §§4-20.5-21-2 (West Supp. 2001) and 36-1-16-2 (West Supp. 2001); Ky. Rev. Stat. §158.195 (Michie 2001); N.M. Stat. §§22-15-15 to 22-15-20 (Michie 2001); N.C. Gen. Stat. §115C-81(g)(3b) (1999); S.D. Codified Laws §13-24-17.1 (Michie Supp. 2001). Moreover, in the last three years, legislatures in at least nine other States considered bills to permit or require the display of the Ten Commandments on government property or in public schools. *See* State Legislative Update for the 2001 Sessions, *at* http://www.au.org/states.htm (March 12, 2003).

The federal government, as well, deems it important to commemorate the importance of the Ten Commandments in the development of the rule of law. For example, every visitor entering the National Archives building to view the original Constitution and Declaration of Independence must first pass under the Ten Commandments embedded in the entryway to the Archives. *See* http://wallbuilders.com/resources/search/detail.php?ResourceID=41 (last visited March 19, 2003). And, of course, Justices of this Court need only look over their left shoulders from the bench to see

Moses holding the Ten Commandments and looking down upon them.

Yet these widespread public acknowledgments of the important role of the Ten Commandments have, in recent years, become the subject of an increasing series of litigation attacks.[1] Over the past few years, there has been persistent and pervasive litigation seeking to remove such displays or to prevent their future construction. *See, e.g., Am. Civil Liberties Union v. Mercer County*, 240 F.Supp.2d 623 (E.D. Ky. 2003); *Van Orden v. Perry*, No. A-02-CA-833-H (W.D. Tex. October 2, 2002); *Glassroth v. Moore*, 229 F.Supp.2d 1290 (M.D. Ala. 2002); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 211 F.Supp.2d 873 (N.D. Ohio 2002); *Am. Civil Liberties Union of Tenn. v. Hamilton County*, 202 F.Supp.2d 757 (E.D. Tenn. 2002); *Freethought Society v. Chester County*, 191 F.Supp.2d 589 (E.D. Pa. 2002); *ACLU Neb. Found. v. City of Plattsmouth*, 186 F.Supp.2d 1024 (D. Neb. 2002); *Am. Civil Liberties Union of Tenn. v. Rutherford County*, 209 F.Supp.2d 799 (M.D. Tenn. 2002); *Am. Civil Liberties Union v. McCreary County, Ky.*, 145 F.Supp.2d 845 (E.D. Ky. 2001); *Christian v. City of Grand Junction*, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001); *Doe v. Harlan County Sch. Dist.*, 96 F.Supp.2d 667 (E.D. Ky. 2000); *Am. Civil Liberties Union v. Pulaski County, Ky.*, 96 F.Supp.2d 691 (E.D. Ky. 2000); *Kimbley v. Lawrence County, Ind.*, 119 F.Supp.2d 856 (S.D. Ind. 2000).

These litigation campaigns have thrust the status of state and local monuments into substantial legal uncertainty and have sparked

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[1] *See generally* Freedom from Religion Foundation, *Action Alert* (Sept. 5, 2001), *at* http://www.ffrf.org/action/10comm.html (last visited Mar. 20, 2003) (Internet web site urging persons to protest Ten Commandment monuments on state property in Alabama, Arizona, and Texas).

growing public debates about the permissibility of recognizing the Ten Commandments publically.[2]

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[2] "What some see as a legal violation, others view as a symbol of our nation's roots." Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept. 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml. Opponents complain that a monument displaying the Ten Commandments "sends the message that people who adhere to its principles 'are the inside, favored group' . . . and people with other beliefs are outsiders." Joe Garner, *ACLU Sues Over Commandments*, MILWAUKEE J. SENTINEL, May 6, 2001, at 12A, *available at* 2001 WL 9354431. They see the display as a "thinly disguised attempt[] to use government to promote religion" and send a "distinctly Judeo-Christian message." *See* Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00.

On the other hand, supporters may see efforts to remove or block the erection of such monuments as "part of a systematic campaign . . . to denigrate God . . . in public life" and as "attempts to deconstruct the American way of life." *See id.*; John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936. They view such monuments as a simple "acknowledg[ment] of their religious heritage," Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349, and as a recognition of the roots of the American justice system. John Hostettler, *The Church/State Separation Fallacy*, (Aug. 1, 2001), *available at* 2001 WL 5421955. Supporters argue that "the Ten Commandments are as much civic and historic treasures as they are religious," and that the Decalogue is "a code of moral conduct that promotes respect for our system of laws and the good of society." *Display the Ten Commandments: An Important Step in Promoting Morality*, Christian Law Association, *available at* http://www.christianlaw.org/display_ 10c.html.

II. THERE IS A SIGNIFICANT SPLIT IN THE COURTS OF APPEALS AS TO WHETHER TEN COMMANDMENTS DISPLAYS VIOLATE THE ESTABLISHMENT CLAUSE.

There is a growing split among the courts of appeals regarding the constitutionality of Ten Commandments monuments. The Sixth and Seventh Circuits have held that such monuments violate the Establishment Clause. *See Adland v. Russ*, 307 F.3d 471 (CA6 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (CA7 2001); *Books*, 235 F.3d 292. The Tenth Circuit, on the other hand, joined by the Colorado Supreme Court, has held similar monuments constitutional. *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (CA10 1973); *Colorado v. Freedom From Religion Found.*, 898 P.2d 1013 (Colo. 1995).

The split is clear,[3] wide,[4] and deep.[5] The starkness of the split

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[3] Its clarity is evident from the express disagreement among the courts of appeals and from the utterly parallel factual scenarios considered by each. *See* discussion *infra*.

[4] Its width is evident from the fact that the disagreement is not merely over a narrow point of law. The courts diverge over virtually every aspect of the Establishment Clause analysis concerning Ten Commandments monuments. *See* discussion *infra*.

[5] Its depth is evident from the fact that there are three court of appeals decisions on one side of the split (the Sixth Circuit and the Seventh Circuit, twice) and two on the other (the Tenth Circuit and the Colorado Supreme Court). And, there is even greater disagreement among the district courts. *Compare Van Orden v. Perry*, No. A-02-CA-833-H (W.D. Tex. October 2, 2002) (holding that display of Eagles' Ten Commandments monument on Texas Capitol grounds did not violate Establishment Clause); *Christian v. City of Grand Junction*, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001) (holding that display of Eagles' Ten Commandments monument at city hall did not violate Establishment Clause); *Am. Civil Liberties Union v. Mercer County*, 240

in the courts of appeals is further highlighted by the fact that, with the exception of one, all of the monuments in question were *virtually identical*—each had been donated by the Fraternal Order of Eagles during the 1950s and 1960s. *See Adland*, 307 F.3d, at 475; *Books*, 235 F.3d, at 296; *Colorado*, 898 P.2d, at 1016-17; *Anderson*, 475 F.2d, at 30. The Indiana statehouse monument at issue in *O'Bannon* was similar, but actually had replaced the original Eagles plaque, which had been destroyed earlier by vandals. *See* 259 F.3d, at 768. All of the monuments contained virtually identical Ten Commandments text, although the monument in *O'Bannon* also included the text of the Bill of Rights of the United States Constitution and the text of the Preamble to the 1851 Indiana Constitution. *See Adland*, 307 F.3d, at 475; *O'Bannon*, 259 F.3d, at 768-69; *Books*, 235 F.3d, at 296; *Colorado*, 898 P.2d, at 1016.

And all of the monuments save Indiana's also contained similar symbols, including small tablets containing ancient Hebrew script, the Star of David, a pyramid containing an all-seeing eye, letters of the Greek alphabet superimposed upon one another and thought to signify Christ, an eagle grasping the United States flag, and a scroll

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F.Supp.2d 623 (E.D. Ky. 2003) (holding that display of Ten Commandments in county courtroom did not violate Establishment Clause); *and Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D. N.C. 1999) (same) *with ACLU Neb. Found. v. City of Plattsmouth*, 186 F.Supp.2d 1024 (D. Neb. 2002) (holding that display of Eagles' Ten Commandments monument in city park violated Establishment Clause); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 211 F.Supp.2d 873 (N.D. Ohio 2002) (holding that county judge's display in courtroom of Ten Commandments poster along with Bill of Rights poster violated Establishment Clause); *and Am. Civil Liberties Union v. McCreary County, Ky.* 145 F.Supp.2d 845 (E.D. Ky. 2001) (holding that counties' and school districts' display of Ten Commandments with other historical documents violated Establishment Clause).

stating that the monument was donated by the Eagles. *See Adland*, 307 F.3d, at 476; *Books*, 235 F.3d, at 296; *Colorado*, 898 P.2d, at 1016; *Anderson*, 475 F.2d, at 30. Four of the monuments were located—or planned to be located—among other monuments on the grounds of the seat of government of either a state or a city. *See Adland*, 307 F.3d, at 474-75 (Kentucky Capitol grounds); *O'Bannon*, 259 F.3d, at 769 (Indiana Capitol grounds); *Books*, 235 F.3d, at 294 (City of Elkhart municipal building); *Colorado*, 898 P.2d, at 1014 (Colorado Capitol grounds). The remaining monument was situated at the Salt Lake City-County Courthouse. *See Anderson*, 475 F.2d, at 30.

These varying constitutional results, regarding virtually identical monuments in virtually identical locations, were reached after ostensibly applying the very same legal framework—that never-dying "late-night" "ghoul," the *Lemon* test. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment); *see also Lemon*, 403 U.S., at 612–13.

By its terms, the first two prongs of the *Lemon* test ask (1) whether the challenged state action has a secular purpose, and (2) whether the primary effect of the state action advances or inhibits religion. *Id.*, at 612. The Court has subsequently distilled *Lemon*'s first two prongs to mean that government may take no action that has the purpose or effect of endorsing or disapproving religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).[6]

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[6] Under this Court's precedents, a government display has the purpose of endorsing religion if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S., at 593; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment). In determining whether a government display has the effect of endorsing religion, the

The courts of appeals disagree on the application of virtually every facet of the *Lemon* test to these monuments. As an initial matter, they diverge regarding the character of the text of the Ten Commandments themselves. The Seventh Circuit found the Decalogue to be "inherently religious" text that cannot "be stripped of [its] religious, indeed sacred, significance and characterized as a moral or ethical document." *Books*, 235 F.3d, at 302. This conflicts with the Tenth Circuit's view of the Ten Commandments as "at once religious and secular" and as having "substantial secular attributes," *Anderson*, 475 F.2d, at 33, and with the Colorado Supreme Court's opinion that the Decalogue represents secular history and natural law, *Colorado*, 898 P.2d, at 1024.

The courts of appeals also differ regarding the effect of the symbols that accompany the text on the face of the monuments. The Seventh Circuit held that the presence of Christian and Hebrew text constituted an endorsement of religion. *See Books*, 235 F.3d, at 307. That court similarly held that the eagle grasping the American flag signified endorsement by "specifically link[ing] religion . . . and civil government." *Id.* The Sixth Circuit agreed with this analysis, holding that the "combination of revered secular symbols like the American flag and the Ten Commandment [sic] serves to link government and religion in an impermissible fashion." *Adland*, 307 F.3d, at 486-87.

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question is "what viewers may fairly understand to be the purpose of the display." *Allegheny*, 492 U.S., at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). And that question is evaluated by the objective standard of the reasonable observer, deemed to be informed of the history and context of the display in question. *Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment).

This reasoning conflicts with *Colorado*, in which the court held that the same symbols did not endorse religion because their largely secular character negated any message of endorsement. *See* 898 P.2d at 1023-24. "We find that the juxtaposition of the Christian Chi and Rho with the Jewish Star of David reflects an acknowledgment of reconciliation and diversity more than any sentiment of intolerance." *Id.*, at 1023. The court also found that the all-seeing eye had both secular and religious meanings, and thus conveyed no message of religious endorsement. *See id.*, at 1023-24. Finally, unlike the Sixth and Seventh Circuits, the Colorado court concluded that the eagle and American flag were "patriotic symbols" that likewise expressed no endorsement of religion. *See id.*, at 1024.

The courts also disagree over the underlying purpose of erecting Ten Commandments monuments. The Sixth and Seventh Circuits relied principally on this Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980)—which concerned the constitutionality of mandating the posting of the Ten Commandments in the coercive context of public schoolchildren subject to compulsory attendance. Notwithstanding *Edwards v. Aguillard*'s admonition that courts should be "normally deferential to a State's articulation of a secular purpose," absent a "sham," 482 U.S. 578, 586-87 (1987), both circuits read *Stone* as "compell[ing]" a rejection of the State's proffered secular purposes, *Adland*, 307 F.3d, at 481; *see also Books*, 235 F.3d, at 302-04. In contrast, *Anderson*[7] and *Colorado*

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[7] To be sure, the fact that *Anderson* was decided before *Stone* has provided a basis for a Tenth Circuit panel, in a footnote dictum, to question its reasoning. *See Summum v. Callaghan*, 130 F.3d 906, 913 n.8 (CA10 1997). But *Summum* did not overrule *Anderson*, *id.*, and neither did *Stone* (indeed, the *Stone* majority did not even mention *Anderson*, despite the dissent's reliance on the case, *see* 449 U.S. at 196 (Rehnquist, J., dissenting)). And *Anderson* was in a far different context—not in a

both found ample secular purposes in erecting the virtually identical monuments, given the Ten Commandments' "substantial secular attributes," 475 F.2d, at 33, "expressions of universal standards of behavior common to all western societies," and "large role in the development of the common law and . . . national constitution," 898 P.2d, at 1024.

Finally, the courts diverge on whether the overall secular context of the monuments contributes to or detracts from any message of religious endorsement. The Sixth Circuit held that the secular monuments and displays that were to surround the Ten Commandments monument in the Kentucky Capitol garden area were essentially of neutral effect, neither enhancing nor diminishing the religious endorsement the court found to emanate from the monument. *See Adland*, 307 F.3d, at 487-88. The Seventh Circuit, on the other hand, held that the secular context of the Indiana monument amplified the Ten Commandments' religious message. It found that the juxtaposition of the Bill of Rights and the Preamble to the Indiana Constitution alongside the text of the Ten Commandments "impermissibly linked" religion and government, resulting in an improper religious endorsement. *See O'Bannon*, 259 F.3d, at 773. Similarly, in *Books*, the Seventh Circuit concluded that the secular monuments surrounding the City of Elkhart's Ten Commandments monument augmented the religious nature of the Decalogue. *See* 235 F.3d, at 306.

In contrast, the *Colorado* court held that the context of Colorado's Ten Commandments monument communicated secular history and thus neutralized the Ten Commandments' religious character. "The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences

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potentially coercive schoolroom setting—than *Stone*, as *Colorado* compellingly reasoned. 898 P.2d, at 1022-23.

that make up the history of our nation and reflect upon a history that is also Colorado." *Colorado*, 898 P.2d, at 1025. That conclusion is squarely inconsistent with the Seventh Circuit's view that secular surroundings constitute an "impermissible link" between religion and government that somehow enhances religious endorsement.

The decision below and the decisions in *Books* and *O'Bannon* fundamentally conflict with the decisions in *Anderson* and *Colorado*. The Court should grant certiorari to resolve this conflict.

III. THE COURT SHOULD CLARIFY AND REAFFIRM THE EXTENT TO WHICH GOVERNMENT MAY LEGITIMATELY ACKNOWLEDGE RELIGION'S ROLE AS A FOUNDATIONAL ASPECT OF OUR NATION'S LAWS AND HERITAGE.

"[I]t has never been thought either possible or desirable to enforce a regime of total separation [between religion and government]." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973). The overarching principle animating the Establishment Clause is government neutrality towards religion. *See Wallace*, 472 U.S., at 60. That is, government cannot favor religion over nonreligion, and it cannot favor one religion over another. *See Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 226 (1963). At the same time, government cannot "show a callous indifference to religious groups" because "[t]hat would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also Everson v. Board of Educ.*, 330 U.S. 1, 18 (1946) (stating that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary"). As Justice Goldberg wrote in *Abington*,

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the

> religious which the Constitution commands, but of brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings Government must inevitably take cognizance of the existence of religion." 374 U.S., at 306 (Goldberg, J., concurring).

The Court has also recognized that complete separation between government and religion "'is not possible in an absolute sense'" and that "'[s]ome relationship between government and religious organizations is inevitable.'" *Lynch*, 465 U.S., at 672 (quoting *Lemon*, 403 U.S., at 614). "Nor does the Constitution require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility towards any." *Id.*, at 673 (emphasis added); *see also Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in the judgment and dissenting in part) ("Government policies of accommodation, acknowledgment, and support of religion are an accepted part of our political and cultural heritage."). The Establishment Clause is elastic enough to "permit[] government some latitude in recognizing and accommodating the central role religion plays in our society." *Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in judgment and dissenting in part). Through accommodation, government shows "respect to the religious nature of our people." *Zorach*, 343 U.S., at 314.

Accordingly, this Court has consistently upheld the constitutionality of recognizing the impact and significance of religion on American culture and society. For example, the Court has acknowledged that its own court proceedings open with an

announcement concluding, "God save the United States and this Honorable Court." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). Similarly, in *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, *Moses holding the Ten Commandments* on the frieze of this Court, and regular presidential proclamations for a National Day of Prayer.[8] 465 U.S., at 673-77. As Justice O'Connor explained, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*, at 693 (O'Connor, J., concurring).

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[8] The extent to which expressly religious acknowledgments have been deemed acceptable by this Court is well illustrated by the text of President Roosevelt's 1944 Proclamation of Thanksgiving, quoted at length by the Court in *Lynch*:

> "'[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands. . . .To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.'" 465 U.S., at 675 n.3 (quoting Proclamation No. 2629, 9 Fed.Reg. 13,099 (1944) and citing similar proclamations by six Presidents since (Proclamation No. 5098, 48 Fed.Reg. 42,801 (1983); Proclamation No. 4803, 45 Fed.Reg. 75,633 (1980); Proclamation No. 4333, 39 Fed.Reg. 40,003 (1974); Proclamation No. 4093, 36 Fed.Reg. 21,401 (1971); Proclamation No. 3752, 31 Fed.Reg. 13,635 (1966); Proclamation No. 3560, 28 Fed.Reg. 11,871 (1963)).

To ignore the "history and ubiquity" of religion,[9] and of the recognition of the Ten Commandments in particular, is to, in effect, "adopt[] a stilted indifference to our past and present realities as a predominantly religious people," as Judge O'Scannlain noted in dissent in another recent case striking down a longstanding religious and cultural acknowledgment in public life. *Newdow v. U.S. Congress*, 2003 WL 554742, __ F.3d __ (CA9 Feb. 28, 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc).[10]

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[9] Indeed, the very apex of the Washington Monument is inscribed with the Latin phrase Laus Deo—"Praise be to God"—on the aluminum tip of its capstone. LOUIS TORRES, "TO THE IMMORTAL NAME AND MEMORY OF GEORGE WASHINGTON": THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE CONSTRUCTION OF THE WASHINGTON MONUMENT 82–84 (U.S. Gov't Printing Office, 1985).

[10] As Judge Fernandez noted in the same case, public recognition of the role and history of religion in America establishes a religion only "in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Newdow*, 2003 WL 554742 at *23. (Fernandez, J., concurring and dissenting). Reading the First Amendment to eliminate religious reference ultimately operates instead to "confer[] a favored status on atheism in our public life." *Id.* at *13. (O'Scannlain, J., dissenting from denial of rehearing en banc).

With respect to the Pledge, such a reading is possible only "without reference or regard to our collective experience in the half-century .... In that time, generations of Americans have grown up reciting the Pledge, religious tolerance and diversity has flourished in this country, and we have become a beacon for other nations in this regard. As Judge Fernandez observes, 'it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.'" *Id.* (citing *id.* at n. 4 (Fernandez, J., dissenting)). The same might be said of the fifty some years since the Eagles began donating Ten Commandments monuments throughout the country.

The Constitution requires no such hostility to religion. In short, the amici States believe that between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or acknowledge the important foundational role religion has played in our nation's laws and history. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S., at 792. And they are constitutional because, rather than establish religion, such practices are part of "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674.

IV. This Case Is a Proper Vehicle for the Court to Consider the Establishment Clause Questions.

The presence of a dispute over ripeness does not present a vehicle problem sufficient to prevent this Court from reaching this important issue. Because this case was brought as a facial challenge to the legislative resolution authorizing Kentucky's Ten Commandments monument, the case was tried before the legislative resolution had ever actually been applied. But such is inherent with any facial challenge.

Striking down a state monument on a facial challenge, as the Sixth Circuit did here, is particularly inappropriate given this Court's consistent emphasis on the *context* of a given display. *See Allegheny*, 492 U.S., at 597. Government action should be judged "in its unique circumstances to determine whether it constitutes and endorsement or disapproval of religion." *Lynch*, 465 U.S., at 694 (O'Connor, J., concurring); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("Our inquiry into this question [whether student-led prayer at varsity football games violates the Establishment Clause] not only can, *but must*, include an

examination of the circumstances surrounding the enactment." [emphasis added]).

Yet facial challenges are routinely brought against these sorts of monuments, and courts reach out to decide the merits. *See, e.g., O'Bannon*, 259 F.3d., at 768-69. Especially given the confusion over the meaning in non-school contexts of this Court's opinion in *Stone v. Graham*—and the degree to which that decision resolves the Ten Commandments Establishment Clause inquiry as a matter of law—facial challenges to Ten Commandment monuments can be expected to persist in the future, and courts will continue to address them.

Accordingly, this Court's guidance on when, if ever, such facial challenges are appropriate is much needed by the States and will clarify significant confusion in the circuits. Therefore, this Court should take this opportunity to articulate a clear standard as to when Ten Commandments monuments can be, and more specifically, cannot be held facially unconstitutional under the fact-specific Establishment Clause standards.

PRAYER

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 27, 2003